IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1407-1414, 1419, 1421- 22/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Friday 21 January 2022

Before:
The Honourable Mr Justice Marcus Smith
Simon Holmes
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Advanz Pharma Corp & Others

Appellants

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Mark Brealey QC (On behalf of Advanz)
Daniel Jowell QC, Tim Johnston and Sarah O'Keeffe (On behalf of Allergan)
Brian Kennelly QC and Daniel Piccinin (On behalf of Hg Capital)
Sarah Ford QC and Charlotte Thomas (On behalf of the Auden Appellants)
Robert Palmer QC and Laura John (On behalf of the Intas Appellants)
Robert O'Donoghue QC and Max Schaefer (On behalf of the Cinven Appellants)
Josh Holmes QC, David Bailey and Tristan Jones (On behalf of CMA)

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Friday, 21 January 2022

(10.30 am)

Case management conference

THE PRESIDENT: Good morning, everybody. I will first of all check that you can all see and hear me. I would be grateful if you could just do a roll call of confirmations and then I will make a couple of formal statements.

MR BREALEY: Yes, sir. It's Mark Brealey, I can see and hear you.

THE PRESIDENT: Thank you. Mr Palmer.

MR PALMER: Yes, sir, I can also see and hear you.

THE PRESIDENT: Mr O'Donoghue, I am just going round as you appear on the screen.

MR O'DONOGHUE: Loud and clear, thank you.

THE PRESIDENT: Mr Holmes.

MR JOSH HOLMES: Loud and clear, sir.

THE PRESIDENT: Mr Jowell.

MR JOWELL: Yes, indeed, sir.

THE PRESIDENT: Mr Kennelly.

MR KENNELLY: Yes, sir.

THE PRESIDENT: Ms Ford.

MS FORD: Yes, sir.

THE PRESIDENT: We then get to the people who are not appearing on my screen because we only have nine images. I would be grateful if anyone I've missed out could pitch in. Excellent. If I am missing anybody, I hope the parties who can hear will alert me to any problems, and that goes generally speaking. If we have a technical hitch where someone goes offline, I would be grateful if you could interrupt me to let me know. We will obviously keep an eye on that ourselves.

Good morning, everybody. First off, the usual warning I make in these cases. Are we good for live-streaming? Good. So these proceedings are being live streamed and although they are also remote, this hearing is taking place as if in public before the Competition Appeal Tribunal. Therefore, these are proceedings in open court as much as if they were heard physically in Salisbury Square House.

For those reasons, recordings, transmission or photography of these proceedings is strictly prohibited. There will be an official recording and that will be made available generally, but that is the only recording that can or should be made of these proceedings and failure to abide by that could have serious consequences. I know I don't need to say that, but nevertheless I do.

Secondly, and more substantively, can I thank all of the parties for their very helpful and, if I may say so, constructive submissions regarding the first item on the agenda, which is effectively the philosophical question of where do we go from here. What I am proposing to do is to provide a collective response really by way of clarification and expansion of what we said, taking into account the very helpful written submissions we have received. Then I will be minded to rise for a period that the parties can indicate to take on board what we have said because it will be unfair to bounce you into responding straightaway. How long we do that for, we will discuss, but let me first of all give you our collective and still provisional response on what you very helpfully said.

So ambulatory draft 1 was explicitly articulated as a provisional view, and you can see that from paragraphs 25 and 41. Your written submissions were precisely the response that ambulatory draft 1 was intended to provoke, because I don't think we're going to get anywhere without everyone putting their cards on the table, including the Tribunal, and the cards on the table metaphor is one, just to warn you, that I am going to be returning to. So, I think it is in order that I assist the parties in their submissions by articulating

a response to a number of points you have raised because I don't want the parties to restate what they have already said in their written submissions; I want us to move forward, to reach a consensus ideally as to where we go.

So, the first point I want to make, and to an extent push back on, is the question of whether these are complex cases. The suggestion has been made that the conventional approach, as I could call it, has worked well in past competition cases. And it's certainly true that paragraph 26 of the ambulatory draft refers to existing processes being good at resolving even complex disputes in a fair and transparent way. But actually, what the draft was referring to was the sort of very difficult five or six week non-competition trials that are regularly undertaken in the Chancery Division.

Drawing from my own experiences I would not be suggesting that either Signia v Dauriac, the 751 paragraph judgment on hugely complex facts involving dishonesty, [2018] EWHC 1040 (Ch), nor KeyMed v Woodford, a 485 paragraph judgment on hugely complex facts, dishonesty again, pensions law over the decades, and a very difficult documentary situation, [2019] EWHC 485 (Ch). I would not be suggesting that either of those two cases, complex though they were, be tried any differently. Now, that's not just because those cases came to me so late in the day that I could not shape their procedure, which is one reason why the whole process we're talking about today can't work in the High Court but may work here.

Even if these had been docketed and heavily case managed cases in the environment of the CAT, I doubt if I would have been persuaded by ambulatory draft 1's approach. That said, by way of a warning about where litigation generally is going, in recent times there have been overturned or nearly overturned a number of cases because judgments have taken too long to write. I am thinking about Bank St Petersburg v Arkhangelsky [2020] EWCA Civ 408 at 77 and following, and NatWest v Bilta [2021] EWCA Civ

680. Both of those cases constitute something of a warning shot regarding our processes, even in non-competition cases.

But my point is that there is something about competition cases, and I am probably excluding follow on actions for damages from this class, but something about competition cases that present particular difficulties, which is why ambulatory draft 1 was put in the way it was. So that's by way of expressing a lack of sympathy with the point made by both Cinven and Hg that the hydrocortisone and liothyronine appeals are not complex or particularly complex cases.

In the scheme of competition appeals or regulatory appeals, that may be right, but that wasn't the point being made in ambulatory draft 1. It may well be that ambulatory draft 1 was insufficiently clear on this point, but that really underlines the virtues of an iterative drafting process that ambulatory draft 1 sought to articulate. It's also the case that the parties are entitled to know our thinking as to why competition appeals are particularly complex, and I will be coming back to that point.

Now, a number of parties have raised the question of the risk of an unfair process and we have, entirely unsurprisingly, taken those points extremely seriously. Let me say at the outset: there can be no question of this Tribunal adopting an unfair process and the concerns expressed by some of the parties are such that even if we disagree with them, it may be that the process envisaged by the ambulatory draft has to be abandoned. I hope that that does not occur, but we do need a process that, even if it contains risks and difficulties, is one that all of the parties can buy into going forward. And it does mean that the concerns that have been expressed, which are well expressed and entirely validly made, have to be addressed by us head on, and that's what I am going to do next.

As we understand it, the concerns articulated under the rubric "fairness" are two-fold in nature. First, there is the concern that the three weeks envisaged by the Tribunal for the hearing

of both sets of appeals will simply not be enough to enable each party properly to be heard, which of course is the essence of a fair trial as conducted in this jurisdiction.

The point is put with a variety of stresses, ranging from the CMA's view that we should expand the three weeks in case things go wrong, to a strident, "You will not be able to do the hydrocortisone appeals in three weeks. You might be able to do them in five weeks at a push, but anything less is unfair". So there has been I think a common thread, articulated with varying degrees of emphasis, that three weeks to do both just isn't enough and that you might be able to do hydrocortisone in five weeks, you might be able to do the other appeal in three.

So that is the first broad concern, and we recognise it. I'm just identifying it. I will come to address it in due course.

Moving on to articulating the concerns, the second concern is the concern that the process leading up to trial, however long that trial might be, is in itself unfair. The concern, I think, is that the Tribunal will be prejudging and expressing views in relation to issues that should only be expressed or only determined after a trial.

Now, that I think fundamentally misunderstands what the Tribunal had in mind and misreads the ambulatory draft. But the fact that those points have been made, and made with some force in some cases, does mean that they have to be addressed and I think addressed now. So I'm going to address these points in reverse order because it seems to me that quite self evidently, the procedure that is adopted for hearing a case affects the length that is required to hear it fairly.

So let me start, then, with the question of the fairness for the process running up to trial. Ambulatory draft 1 expressly abjured a staged process of decision-making as unworkable and described the desired outcome in paragraph 38 of that draft as having, at the beginning of November 2022, significant tracts of background fully articulated,

the parties' positions on points of controversy fully stated, and the battle lines clearly demarcated but not resolved.

Now, it's difficult to see how we could have been any clearer about that, so I'm going to have to have resort to Douglas Adams and the Hitchhiker's Guide. What we are looking for is rigidly defined areas of doubt and uncertainty on which the parties can then seek to persuade us. So yes, we do want rigidity, we do want clarity, but emphatically not on the points that matter to the parties. There we want doubt and uncertainty or, to put it more appropriately for the litigation process, we want the parties to be able to put the points that they need to put in order to advance their clients' cases.

So I want to be extremely clear, and I say this as much for the record as anything else: there can be no question, none, of this Tribunal resolving even provisionally a contested point of law or a contested point of fact until it has heard all of the evidence and the parties' final submissions. I don't think I can state that emphatically enough. It may not have emerged with sufficient clarity from ambulatory draft 1, but I want to say that anyone who thought the Tribunal is proposing something different has got the wrong end of the stick.

Related to this point is the concern that by giving a party the pen in respect of a particular section or topic means that the Tribunal will uncritically adopt and unwittingly decide, albeit on a provisional basis, some point. That also, I think, betrays a misunderstanding of what we're getting at, albeit a more subtle misunderstanding because the point itself is more subtle. Of course we appreciate that trials are intended to resolve points of controversy and that therefore finding common ground is at the best of times extraordinarily difficult. If there was complete common ground, one wouldn't have a dispute.

We note the reference to past efforts at dealing with this difficulty in Intas' very helpful written submissions at paragraphs 25 and 26, and of course we accept that there is some virtue

in having a self-standing and completely agreed statement of facts as envisaged by Intas. However, we do not consider that the ambulatory draft 1 approach is all that different from what Intas is proposing, save in this very important regard: ambulatory draft 1 articulates a process which engages the Tribunal at an early stage in articulating the issues.

The reason that, to our mind, matters is two-fold. First of all, it means that the Tribunal gets educated in the substance of the facts at a very early stage instead of just for trial, which is the normal model; and secondly, it is possible to ensure that there is a real focus on the issues that actually matter as the Tribunal sees what it has to decide.

We can of course send the parties away to agree a statement of common ground. But it seems to us that that will take too long to agree and, given the layered nature of competition cases, and I will explain what I mean by that in a moment, unlikely to be of much assistance. So let me try to unpack a little more what ambulatory draft 1 envisaged, because we accept the process was articulated quite generally in the draft, and I think the parties are entitled to a little more detail in terms of what the Tribunal has in mind.

First of all, the definition or description of the section being drafted is absolutely critical but we think achievable. Even sections leading to issues of great controversy can be defined so that they can be neutrally put in a statement. Take, for example, the question of whether there was an unwritten market-sharing agreement, and I am thinking in particular of the point made in Advanz's skeleton at paragraph 18, and I will read that into the record because the point is put very baldly and importantly so. Paragraph 18 says this:

"It would be an anathema to Advanz if there was a process which had its starting point for inclusion in the draft judgment the CMA's statement of fact in the hydrocortisone decision which is said to support an unwritten market-sharing agreement on the part of Advanz and then which would also not be subject to any formal process of inter partes

review. Such a process would be seriously prejudicial to Advanz, undermine the presumption of innocence and a merits-based appeal."

There is no way an ambulatory draft could say that there was or wasn't an agreement of that sort. That is a matter for trial. Sorry, I'm just going to pause there. I think we may have a technical issue.

(Pause).

I am going to pause for two minutes while we resolve this issue. I think I have managed to inadvertently expel my two wing members, which is unfortunate. Let's get this resolved.

What I am going to do I think is I'm going to rise for five minutes because whilst my fellow members can hear me because I am the one talking, I don't think they're going to be able to hear you when you come back. So we might as well resolve this problem now. I'm going to still my camera and my microphone and I hope we will be back with you in five minutes when we resolve this issue.

I will still my camera now.

(10.53 am)

(A short break)

(10.58 am)

MR SIMON HOLMES: Can you hear me?

MR JOWELL: We can hear you.

MR SIMON HOLMES: Can people hear me? Thank you. The problem has migrated I think from myself to the President.

(Pause).

Apologies for the continuing technical problem. We will take another two-minute adjournment.

(11.01 am)

(A short break)

(11.03 am)

THE PRESIDENT: I think we have overcome our technical issues. I'm just going to check.

MR SIMON HOLMES: Can you hear me clearly?

THE PRESIDENT: Yes, I can, thank you. Professor? You can, good.

Can I just pick a sacrificial lamb to check that you can hear me. Mr Holmes, can you hear me?

MR JOSH HOLMES: Yes, sir, we can hear you.

THE PRESIDENT: Thank you very much. I do apologise for that. I'm not quite sure what happened there, but I was just commenting on the point made in Advanz's skeleton at paragraph 18, and I was saying that there was of course no way that any ambulatory draft could say that there was or wasn't an agreement of the sort described in that paragraph. That is something clearly that would have to be resolved after a hearing and would be dealt with only in the judgment handed down after trial.

But it does seem to us that two things could be done in advance of resolving that essential question. First, the nature of the disagreement, the battlefields, as it were, between the parties ought to be capable of articulation. Indeed, it would be quite surprising if it could not be. Secondly, the facts that would need to be considered in order to resolve the issue must be capable of being listed, and by the listing, I mean setting out so that we at least know what each party is saying is the material that needs to be looked at.

So those are both, to take this example, significant areas of drafting where the Tribunal would be hugely assisted on day one of the trial to know what the documents -were -- inevitably the Tribunal would know because they would be in the draft -- and to know exactly what the points of dispute were so that one can go straight in to working out what the thrust of the difference is. So it does seem to us that the definition or description of the section being drafted, which we envisage would appear

in an order, is really quite- critical to this process working but not, we would suggest, insuperably difficult.

The nature of the section being drafted is important. Who is doing the drafting is also important. I suggested earlier that this was intended to be an iterative process, and I strongly suspect that after ambulatory draft 2 is produced, if this process goes ahead, further issues will suggest themselves and there will be refinements to what has already been said to be incorporated in later ambulatory drafts.

It seems to us that if this process goes ahead, one really quite significant question is just how large the chunks incorporated in the various sections would be. One could have a process where one allocates vast sections to the parties, they have two months or so to produce them, then the Tribunal has two months to synthesise them into a next iteration of the ambulatory draft. Take that approach, you're banking an awful lot on getting those large chunks right and you probably only have room for one, at most two, further iterations of the ambulatory draft.

For our part, we think that that would be too slow a timeframe and we would be inclined to have much shorter sections identified for drafting and a much quicker iterative process where actually one gets to ambulatory drafts 7, 8 or 9 before there is a trial. So that is how we see the process working, but we anticipate that that is something which we would be grateful for the input of the parties on, and we would obviously be guided quite significantly by the articulation of the sections of the ambulatory draft. We recognise that we are well behind the parties in understanding what is at issue in the case and it seems to us that the identification of what needs to be drafted is something on which we would welcome input from the parties so that the points can be incorporated in an order going forward.

But we stress that we would not want, indeed we would positively set our faces against, an attempt to list each and every section going forward. What we want is let's start with

the low-hanging fruit, get that done, and then move to on to the harder pickings later on. So that is how we see the process going on.

By way of example, the background section we envisage, it may be that the first step there is that a series of topics as to what needs to be included in that section needs to be discussed between the parties first. Background is hugely important in our view, not necessarily because it's needed to resolve the questions before a court, but because it's necessary so that the outsider can understand the judgment and inferentially the Tribunal would be in a position to decide cases.

Our view is that a judgment should be comprehensible to the reasonably interested and engaged layperson reading the judgment alone. What the final ambulatory draft needs to achieve, it seems to us -- by that I mean the one that is in place before the trial kicks off -- what that final draft needs to achieve is a state of affairs where the reasonably interested and engaged layperson reading that draft would be able to say: I understand the issue or I understand the issues. It's really difficult. I wonder what the court is going to say in response to this particular issue or what is witness X's answer to this particular point. That's where we want to be and I articulate that generally. I'm- not underestimating the difficulty of this process, nor indeed the time the Tribunal will have to commit to making it work, but that is what we have in mind.

We have no issues with the party responsible for drafting a section consulting others. Also, there will be some topics or sections which will be suited to a multi-party approach. For instance, in articulating the grounds of appeal, it would make sense for the appellants to work collectively and for them to produce a single draft without the agreement, albeit the involvement, of the CMA.

Similarly, when drafting the sections on relevant corporate structures, we anticipate that each appellant, to the extent they are taking points on this, would want to draft their own section, but we would not want a series of short points from each party; we would like

that to be synthesised into one complete corporate structure section which we could then review and, if so advised, incorporate.

But whilst we are extremely interested in the parties speaking to each other in a cooperative and sensible way, we do consider that unanimity is counterproductive. It takes too long and it actually results, we think, in vagueness. All too often, in order to get agreement, the hard bits are swept under the carpet. The whole point of this process is not to sweep the hard bits under the carpet, but to articulate them, to bring them out into the open.

The Tribunal intends to take a role in the drafting going forward precisely so that ambiguities, issues being swept under the carpet, and possible misunderstandings, can be identified early on. So we consider Advanz's concern to be helpfully made because it articulates a genuine concern that we must address full on, but ultimately we consider it to be unfounded. We do want to stress that the Tribunal will be astute to avoid incorporating into an ambulatory draft points that are determinative of matters that are in dispute. We are not going to adopt uncritically that which is said.

The parties also need to be aware, to the extent that errors are made in this drafting process, that this is intended to be an iterative process. If, let us say, ambulatory draft 2 involves the Tribunal getting something wrong, whether in terms of specific fact or in terms of emphasis, the one crucial point in the process is that it enables such points to be articulated so that they can be reflected as appropriate in the next draft, and we have no problem in the ambulatory drafts being labelled with health warnings so that it is quite clear what the status of this document is and isn't.

It may be possible, and here I am going slightly off-piste, it may be possible to build in a costs sanction. It could be that every section drafted by the responsible party would be accompanied by a statement of costs. If that draft proves to be culpably unhelpful, the Tribunal could indicate its disapproval by ordering that some or all of those costs be irrecoverable in any event. We say that not because we suspect the costs will be

a driver of this process, it seems to us there is too much at stake for that to be the case, but it would be a good way of indicating a degree of disapproval regarding errors made in an earlier draft and serve to underline that whilst this is the Tribunal's document, the statements are emphatically not the Tribunal's statements until final judgment is handed down.

That brings me to a point which is related to this process question that I am still discussing, and that is whether the ambulatory drafts ought to be public documents. That is a point which is raised by a number of parties. It seems to us that the publication of ambulatory drafts ought to hold no fear for any party because the point of them is not to identify who wins or who loses.

The advantage of publication is that thereafter, all of the parties, including witnesses and experts, can use the ambulatory draft as a shorthand for explaining their points. In competition cases, context is often really critical and a witness will know exactly the Tribunal's understanding on any given point and will know how to pitch his or her answers because what the Tribunal understands will be clear when all too often in court processes, it isn't.

Equally, when cross-examining, counsel will be able to put clearly to the witness by reference to the draft the point that he or she wishes to make. We anticipate that identifying but not resolving points in this way will significantly shorten the oral proceedings by rendering redundant the "let me take you through the history by reference to the documents" sort of questions that one gets when one has a standing start rather than an advanced start.

We do appreciate that there might need to be a fail-safe in publicity in that one could circulate a draft ambulatory draft so that really bad points can be spotted without publicity and for the ambulatory draft to then be appended to an order of the court, making clear what it is and putting into the public domain. So one could have a form of fail-safes so that

really serious concerns can be remedied in that way, but we would not anticipate that process being used for mere drafting points.

So why is it that we consider competition cases to be so peculiarly complex that they require all this emphasis on a new procedure? I said earlier that we would try to articulate why competition appeals are so complex or have characteristics that seem to require different procedural treatment from complex cases in other jurisdictions. We think that it is because whereas most litigation is sequential in that one moves and resolves the case sequentially from point A to point B to point C, and so on, competition litigation is often layered in that even a consideration of point A is impossible until background facts X, Y and Z, which may in themselves be uncontroversial, have been set out and ascertained. It seems to us that that is true, for instance, of market definition. There are a whole range, a myriad of facts, which need to be looked at.

I am being told that there is bad network quality. Are you having any difficulties in hearing or understanding me?

MR JOSH HOLMES: Not from my part, sir. It's very clear.

THE PRESIDENT: I will continue, in that case.

So market definition is a case in point where the question is intrinsically a hugely difficult one and we would obviously not be resolving that until after trial. But there are many, many facts which need to be gone into in order to work out how a market is --defined I am taking this simply as an example.

Some of them will be uncontentious, in which case they can be articulated. Others will be contentious, in which case the area of contention needs to be articulated as a preliminary step to be resolved in order to deal with the question of market definition. But we do think that the parties are entitled to have the best articulation of the baseline from which they are arguing about market definition, to carry on with my example, going forward.

So that we see as one virtue of this approach. Another related virtue is concerning data. Competition cases are data-heavy and it may well be that well before trial, it is clear that a data set is open to multiple interpretations from the experts which will need to be resolved after the court has heard the evidence of all the relevant witnesses and heard submissions. That's fine, but all too often one has, anterior to the opinion question of what the data mean, an argument about what the data actually are, or an argument about whether there is an error in the data, or how great that error is.

That is again an area that needs to be either resolved or, in terms of what the dispute is, articulated well before one gets to trial. In short, if the data are agreed, that needs to be stated so the parties know where they stand. If the data are contentious, why are the individual strands contentious? Actually knowing what really matters in short really matters, and the sooner what really matters is known, the better.

Similarly, it becomes quite apparent in regulatory appeals that what appears to be an uncontentious factual statement in the decision actually has hidden and contentious depths. Again, such points need to be fleshed out early so that the disagreement can be identified. I'm going to revert back to the cards on table metaphor that I began with.

Litigation in this jurisdiction quite rightly adopts a cards on table approach. There should be no, and there very rarely are, surprises. Pleadings, witness statements, experts' reports, written submissions, lists of issues, chronologies, they're all part of this objective. But although these documents of course interrelate, they have to, it is often the case, as it seems to us, that the parties are laying their cards, face up naturally, on their own card table, and not at a table where the other parties are sitting.

As a result, hard points can be swerved and different agendas set. It seems to us that forcing the parties to sit at the same table, the ambulatory draft, and requiring them to articulate their points in context in a situation where the Tribunal is at the end of the day holding

the pen achieves two things not achieved by agreed drafts or by chronologies produced independently by the parties or other documents.

First of all, there is the early engagement of the Tribunal on the facts and the law that will be relevant at trial. Secondly, there is unequivocal and early engagement by the parties on the points that are going to matter and that will need to be resolved at trial. And that, as we see it, is the virtue of the process that we are provisionally suggesting.

I'm going to move on now to the second area of unfairness that has been quite rightly raised by I think all of the parties. That is the unfairness question arising out of a hearing that is too short. This of course arises out of the concerns expressed by the parties regarding the fairness of the process up to trial. I'm sorry to have gone on for so long about that, but the fact is the process leading to trial is something that informs the length of trial when it occurs. It seems to us as a starting point, thinking about trial length, self-evident that any process that does not allow a party properly to be heard is for that reason alone unfair. I want to make that very clear.

But at the same time, all of the parties will appreciate that the court controls its own procedure and its own processes. Those controls include the time limits for cross-examination of witnesses, the guillotining of trials, and so on. Gone are the days when the parties could say: we need six weeks for trial and they would, without question, get those six weeks. That is not the case anymore.

My practice is to place great reliance on the parties' time estimates and to list accordingly. But it seems to me that the points made by the parties, or by most of the parties in the written submissions we received in the last couple of days, presume that the benefits of the process that we have articulated will not, whatever their other merits, include very much saving in terms of trial length. I think that is a point which underlies a number of the written submissions we have read.

This is a novel process, we all agree that, and we cannot be sure that it will be working. Indeed, to put my cards on the table, the three Commercial Court weeks referenced in the draft is inevitably an impressionistic estimate, done without the advanced ambulatory draft that might serve to validate it. The whole point is that the last ambulatory draft will come shortly before November and not sooner. So it seems to us pointless to get into a debate about whether this process will or whether it will not work. The fact is there is a risk of failure. You don't need to quantify the risk, but what we do need to do is to manage it because we do consider that the parties make entirely proper points about the risks of the process that we articulate.

Ambulatory draft 1 states at paragraph 30 that the Tribunal would be minded to allocate three Commercial Court weeks. I want to stress that that is not a reflection of the Tribunal's capacity in 2022. It was rather a reflection of the Tribunal's admittedly impressionistic sense of how long the appeals would take if its process operated as intended. It's the risk of the process not working as intended that we need to manage, and in this regard we have two proposals.

First of all - and we are entirely neutral between these and other proposals, but I articulate them so that the parties can take them away and consider -them - first of all, we split the appeals now. We hear the liothyronine appeals in the conventional way in June 2022, time estimate of three weeks. The hydrocortisone appeals would be managed in the manner described in ambulatory draft 1, with a three week trial in November 2022, but with the Tribunal keeping two weeks in reserve in case of need. That's- option one.

Option two, we proceed as planned, with both appeals managed together, using ambulatory drafts, with a three week trial, plus two weeks in reserve in November/December this year. However, rather like Houston's mission control, we have a go/no go CMC at the end of July 2022 at which the decision is made either to go, to hear both appeals as

envisaged, or if things clearly are not working, and I think by the end of July we will know that, to either hear hydrocortisone only, or to hear liothyronine only.

In the case of the latter two options, the appeals not heard would be allocated as early a date as possible in 2023. We would be, until July 2022, entirely neutral as to what would be done in 2023 and that's because the hope and expectation would be that the process we have described would work. But that, as it seems to us, would, without undue prejudice to anyone, ensure that we have a get out of jail free card that could be played if the process clearly doesn't work.

I'm nearly at the end, the parties will be relieved to hear. I want to say a final point about costs. Ambulatory draft 1 at paragraph 26 stated that our objective was not to devise a procedure that costs less money. I would not want that statement to be misunderstood. The points we wanted to make was that we wanted to devise a better process not to save costs, but to do the job we are doing better. It would be pleasing if, assuming this process is adopted and works, costs were in the long run to be saved. We consider that that is the likely outcome of a more efficient process: the costs will be less and we suspect that will be the case. But this is a novel process and we can't of course predict how it will run. But we certainly do not expect the parties' costs to be increased because we see this process as one of redirecting the parties' efforts and not adding to them.

We have no problem in ordering replies, for example, to take place, and indeed all the paraphernalia of a conventional trial process. If the parties want that, they absolutely can have it, and it's probably a good idea to do so. But we would expect these documents to be far shorter and to engage with the ambulatory draft process that we would, assuming we go forward, be having.

So we do see that there will be a synthesis between the conventional processes and the novel elements of this process. It goes of course without saying that things like agreed statements of fact and chronologies and lists of issues, all of these things will be

embedded as part of the ambulatory draft process that we have been discussing. So we may be wrong about the costs burden on the parties, but we don't think so and in any event, time will tell.

What we are satisfied with is that there will be additional burdens on the Tribunal. We are prepared to accept those because we think that, in the long run, it will be worthwhile. What we want to avoid is what I think happens far too often in heavy litigation, which is that the Tribunal does its serious thinking after the trial has finished.

Now, obviously serious thinking after the trial has finished is the essence of what should happen after judgment, but it should be based upon a very clear understanding of what the parties' genuine beef, genuine dispute is, and all too often, one is only framing actually what the dispute is after the hearing. And that, to my mind, is fundamentally unsatisfactory and actually quite unfair to the parties.

What one should have is a process where the battle lines are drawn with absolute clarity, where the evidence that all of the parties want to adduce is articulated and put into boxes of "controversial" or "not controversial". The controversial boxes are then further specified so that one knows right from day one what is and what is not on the agenda. That, we think, will enable a very structured trial process, which is why, to conclude, we consider that a shorter timeframe is possible, but we are very willing to accept that that may fail. The question really is do we try.

I'm very sorry that we have gone on for so long, not helped by the technical issues. I indicated that we would rise. I think we will rise in any event for the transcriber's benefit, but how long do we rise for is the question. Mr Holmes, I see you have your hand up.

MR JOSH HOLMES: Sir, for our part, I think it would be useful to have at least 15 minutes to discuss. Other parties can bid higher if they think more time is needed.

Can I ask one clarificatory question just for the purposes of taking instruction on the second of the two options you outlined as proposals for going forward. As I understand it, that

proposal would be to keep to the three weeks with two weeks in reserve in November for both trials and then to have a go/no go CMC to decide how to proceed in July. Am I to take it that the Tribunal would be prepared to keep open the question of how the trials were structured during that window with the possibility, if this proved to be more efficient, of hearing them sequentially and back-to-back within the time allocated?

THE PRESIDENT: Well, let me say this: we would consider that all options would be open for discussion at the end of July 2022. I think the real question would be, assuming we go down this route, is this route going to work or are we going to have a car crash in November? If we are going to have a car crash in November, then the question is what do we do about it, and there may be very many ways in which one can slice that particular issue and we would be open to using those five weeks however the parties felt would work. We would obviously have our own views, but what I am assuming I think is a process that goes so badly wrong that actually the parties were saying that you can only do hydrocortisone in five weeks and liothyronine in three weeks proved to be right so that one has to do one appeal or the other properly in November with the result that the other has to be kicked over to 2023.

Now as it were, that's the worst-case scenario, I hope. I mean, I would like to think that however we run this process, it won't go worse than that. But with that worst case in mind, we would be minded to do that.

But if one could do the two back-to-back, then we would be open to that. I just feel that that might be an unlikely scenario. Quite a pleasing one, actually, but an unlikely scenario given the basic hypothesis that this isn't going to work. So I hope that answers your question, Mr Holmes.

MR JOSH HOLMES: It does.

THE PRESIDENT: I certainly didn't intend to be prescriptive about what we will do at this go/no go CMC if we have it.

15 minutes seems to me too little. I will say half an hour, unless anyone violently objects because these are difficult questions and I wouldn't want anyone to feel that they were being rushed into a response. So if you need longer, do say so, but we will say provisionally we will resume at 12.05 and do let the registry know if you want longer.

MR JOSH HOLMES: Thank you, sir.

THE PRESIDENT: Thank you very much. We will leave the courtroom and see you at 12.05. Thank you all very much.

(11.36 am)

(A short break)

(12.05 pm)

(Proceedings delayed)

(12.20 pm)

THE PRESIDENT: Good afternoon, everybody. I will just wait for live stream to engage and to make sure that that's okay.

We are live. What I am minded to do is call upon the hydrocortisone appellants first, with Mr O'Donoghue first, followed by Ms Ford, and then Mr Palmer, and then we will see where we go from there. But, Mr O'Donoghue, if you wouldn't mind kicking the ball first.

MR BREALEY: Sorry, sir, in the hydrocortisone appeal, clearly Advanz is probably the lead appellant.

THE PRESIDENT: If you have your own running order, that's absolutely fine.

MR BREALEY: It's not, we just didn't want to be left out because we're the company that is adducing most of the evidence.

MR O'DONOGHUE: Sir, I am happy to yield, but I would like to go second if possible.

THE PRESIDENT: I was picking by order of strength of opposition to our proposals judging from the skeletons. In that case, Ms Ford, if you don't mind, you will go first, then Mr O'Donoghue, then Mr Palmer, then Mr Brealey, then Mr Johnston and then Mr Kennelly for Hg Capital, concluding with Mr Holmes for the CMA.

If I have left anyone out, do please shout.

MR JOWELL: It's Mr Jowell, not Mr Johnston.

THE PRESIDENT: I'm so sorry.

MR JOWELL: Not at all.

THE PRESIDENT: I made a note of that but didn't read it. My apologies, Mr Jowell.

Very good, Ms Ford.

MS FORD: Sir, we are very grateful to the Tribunal for having taken the time to address the various concerns that have been expressed so carefully.

To cut to the chase in terms of the two options the Tribunal has identified, for our part we have a strong preference for option one. We think that it will be of great assistance to the parties to have clarity now as to the way in which these matters are going to go forward, rather than leave it until July and only know at that point the way in which matters are going to proceed. We have, as we indicated in our skeleton, given careful thought to whether we think that the Lio and Hydro appeals should be heard together, and our view is that it is not necessary for them to be heard together. So on that basis, option one seems preferable from that perspective, as well.

We do have a minor suggestion in the context of option one, which is that it might still be necessary to have a CMC at some point in order to take stock as to how the ambulatory process is working and how that might then impact on the trial of the Hydro matters. So we would suggest that -- obviously option two expressly contemplated the CMC in July and we would suggest it would make sense at a suitable moment to have a CMC

for the purposes of option one as well just to take stock of the success of the ambulatory process.

Turning to the ambulatory process, one of the concerns that the parties had articulated was the way in which the process might encompass a degree of review of drafts and we are grateful to the Tribunal for having heard and sought to address those concerns. We understand that what's now being envisaged is that there might well be -- I understand the Tribunal said seven, eight or nine ambulatory drafts and that that process will therefore build into it an opportunity for the parties to review what has been produced and to respond critically to it if necessary. We anticipate that in the course of that process, the Tribunal will have very well in mind that the drafts it is receiving will necessarily reflect the perspective of one party until they have been reviewed, and so in incorporating those into an ambulatory draft, we anticipate the Tribunal will bear in mind that it is, at that stage, an unreviewed and unagreed draft.

We also endorse the indication the Tribunal gave about the importance of identifying the topics on which drafts will be sought. And in terms of the Tribunal's reference to low hanging fruit, it seemed to us that there might be certain topics that will assist the Tribunal in understanding later versions of the ambulatory drafts if they could be dealt with at an earlier stage.

To offer two examples of those, perhaps we envisage they might be building blocks to the later ambulatory drafts: background on how the generic industry works, it seemed to us, might be something that would assist the Tribunal in understanding some of the more complex later subject matter, and also background on the regulatory framework, in particular with a view to those matters that affect the issue of countervailing buyer power which appears in one or two of the appeals.

We would suggest that the appellants might well be best placed to contribute initial drafts of those subject matters. Obviously the Tribunal does have the benefit already of the

CMA's perspective on those things in the context of a Decision, and so it seemed to us sensible that the appellants could now contribute their perspective on those matters and that would then build in an opportunity for the Tribunal to come up to speed on these issues and then building blocks for subsequent drafts.

A second point that the Tribunal has addressed is the way in which the draft might be publicised. We understand that the Tribunal's concern is to ensure that the public are kept appraised of the process and have the ability to understand what is going on and what is in issue, and we certainly see the force of that as a concern. We would suggest that it might make sense for the Tribunal to direct that insofar as the draft is published, it may only be used for the purposes of the proceedings until a final judgment is produced by the Tribunal. That seemed to us both to enable the draft to perform its function of enabling members of the public to understand what is going on, but it does then further address the residual concerns that might arise about the publication of a document which, at least at certain stages, will contain the perspectives of one party and not yet have been the subject of review.

Sir, those were the suggestions that we had.

THE PRESIDENT: Ms Ford, thank you very much. Just to pick up on a couple of points which are made by clarification rather than anticipation of what others may say, we fully anticipate that whichever process is adopted in terms of splitting or not splitting cases, if there is to be any kind of process involving ambulatory drafts, we would anticipate the need for quite possibly several, maybe short, but several case management conferences, and although we don't want to get the diaries out now because it's probably too complicated, we would want to budget for a number, not necessarily day long, but maybe hour long CMCs commensurate with the active role that the Tribunal envisages it's taking. So certainly there would be a July CMC, but

there would be multiple CMCs before that according to need. If there is no need, then we can cancel them, but I think there would be considerable need.

If I can just make clear that we entirely agree with what you said about the generic drug industry and the regulatory framework. It's precisely that sort of material which I suspect the parties regard as common knowledge, as something which is just assumed to be known. It's exactly that sort of material that we think we know, maybe we do know, but it needs to be there in black and white so that our understanding corresponds with that of the parties.

Speaking for myself, I know a reasonable amount about generic drugs because of the patents work I have done, but that's a completely different angle and isn't knowledge that I should be deploying here. I should be deploying what the parties are putting in evidence but sooner rather than later. So those are points which we see as absolutely early in the queue as being the boring foothills which constitute the sort of foundation on which the contentious disputes would run. I say that by way of an indication that we're on the same page.

We hear what you say about publicity and some form of health warning at the top of the ambulatory draft I think would be in order. Restriction on use I can see might have difficulties, but certainly we wouldn't be averse to something along those lines. I sort of say that by way of indication to assist those who come after you. But thank you very much, Ms Ford.

Mr O'Donoghue.

MR O'DONOGHUE: Sir, a handful of points, if I may, first of all on the question of inter partes review before the ambulatory judgment stage. It might sound like an incredibly pernickety point but in my submission, it is important that there is a process of inter parties review before something is fed into the sausage machine of the Tribunal because with the best will in the world, if there is essentially a unilateral

process whereby one party puts forward its document, there is a risk that that has an anchoring effect if they're incorporated into what is a draft ambulatory judgment, even if there is then some subsequent amendment of the ambulatory judgment in a subsequent draft. It may be hard to avoid the impression --

THE PRESIDENT: Mr O'Donoghue, you've suddenly gone mute.

You're back now.

MR O'DONOGHUE: So we would say as a matter of sequencing, there needs to be both and for what it is worth, in paragraph 12.5 of the CMA's skeleton, they did accept that in principle there should be an inter parties review before the Tribunal stage.

Second, we understand and we think it's entirely laudable that the areas of discussion pre-trial should to the extent possible either focus on uncontroversial matters or in relation to matters of controversy, at least sketch out the terrain or put the cards on the table. But we do have a practical concern, sir, which is what I call a risk of mission creep, and if I can just give you, sir, an example.

As we set out in our skeleton at paragraph 30, one can easily imagine how in relation to the legislation and public policy guidance on orphan designation, that must be capable of either incomplete or substantial agreement, and we can see how that can and should be done. But the difficulty, sir, or the potential difficulty we see is that trying to hermetically seal these banal matters from things which are likely to prove much more controversial may be easier said than done.

If I can just give you an example. I think, sir, in bundle 4, you received copies of Advanz's witness evidence on hydrocortisone, Mr Beighton, Mr Sully, and so on. I think it was submitted yesterday, I hope it reached the Tribunal.

THE PRESIDENT: Yes, we have it. Which page of that bundle?

MR O'DONOGHUE: So starting with Mr Beighton, it's page 26, paragraph 39.

THE PRESIDENT: One moment. Yes, thank you.

MR O'DONOGHUE: It starts:

"I knew from experience ..."

So he said:

"I knew from experience ..."

THE PRESIDENT: I don't think that's the right -- so bundle 4, page 26.

MR O'DONOGHUE: Paragraph 39 of Beighton.

THE PRESIDENT: Yes, I have paragraph 39. It starts:

"In its communications, the HRA ..."

So it doesn't start the way you read it.

MR O'DONOGHUE: Just a second, sir, that may be a bad reference.

It's near the bottom, sir.

PROFESSOR MASON: I think your reference is eight sentences down in paragraph 39.

MR O'DONOGHUE: I am grateful, yes. So "I knew from experience", and so on.

THE PRESIDENT: Yes, I have it.

MR O'DONOGHUE: There he's talking about the impact of the orphan designation. I will just invite you to read it over the page, sir, at 40 and 41. So for example, he says at 41:

"The implications of the orphan designation issue for AMCo evolved over time."

And so on. And likewise, just to complete the references, in section E2 of Mr Sully's witness statement, which is on page 60, he has an entire section on the orphan designation issues, and then of course we have the report from Dr Newton who talks about the regulatory constraints in terms of marketing these kinds of orphan designation products, and so on.

So, sir, the practical concern we foresee is that in many ways, the real issue of controversy in terms of the orphan designation is not so much what the legislation in black letter terms does or doesn't say; it is really in terms of what practically it entailed in terms of the ability to promote and market and effectively sell these products. We do have

a concern, given that this has been teed up in some detail in witness evidence which has yet to be heard and tested, that having a pre-trial process which involves potentially a degree of second guessing where the ultimate areas of controversy may lie, it does risk, in our respectful submission, potentially cutting across some of the evidence yet to be heard. So that's why we say, sir, there is a risk of mission creep in terms of even a process whereby cards are put on the table because we have yet to hear from these people.

THE PRESIDENT: Yes. Sorry, excuse my interrupting, but let me try to explain how we see this working so that we have absolute clarity.

First of all, I think as a matter of nomenclature, we are not going to use the word "ambulatory judgment" because I think that gives very much the wrong impression. We have used the term "ambulatory draft", and I think we're saying that because this is emphatically not a judgment; it is a subject to revision text where the words in the document are not in any way, shape or form adopted by the Tribunal; they are simply shaped by the Tribunal in the hope that they will assist the crafting of a final judgment post hearing. So that's a minor point, but I think an important one from a perspective point of view.

To go to your point, I'm not going to talk about orphan drugs because my ignorance would become too rapidly clear, but let me give a nice example about contractual interpretation, where one has in the first instance the written contract and one may say that one has to review that in the light of a number of documents, and let's assume a violent disagreement about what the contract means.

First thing one can do uncontroversially is set out the documents that each party says form part of the documentary matrix for the contract. Now, there may be huge disagreement as to what documents fall in and what documents fall out of the documentary matrix but one can at least articulate the list of documents and the parties' position on each of them.

So it may be, for instance, said that a particular letter which is relevant to construction didn't cross the line and therefore can't be used in a constructive process.

Then one has on top of that the Lord Wilberforce factual matrix more generally, and hereto no one disputes that the factual matrix is relevant. There may be huge dispute as to how relevant, and there will always be dispute as to what forms part of the factual matrix, and in that sense it's a bit like market definition.

We would not anticipate deciding what was and what was not part of the factual matrix in the course of this process. What we would envisage deciding or dealing with is listing what the parties say is part of the factual matrix with a view to identifying, to the extent they exist, points of controversy so that after hearing all of the evidence, we can say, going through the list, "We have decided that this was part of the factual matrix and now we decide what its significance is."

So we get to a position where the deckchairs on what is hopefully not the Titanic are there on deck and we can rearrange them after the event in a manner that enables a swift resolution of the points that are in issue. And equally, we would hope this would be of assistance to counsel so you can say: well, look, the positioning of this particular deckchair, actually it belongs here rather than there, but at least we know what deckchair we're talking about and whether it is an agreed deckchair or an unagreed deckchair. These things are how we see it working and I think your point about orphan drugs ought to be susceptible of parsing in the same kind of way. To be clear, I know the convention is that one doesn't regard as evidence the witness statements until the witness is called. I think it is explicit -- no, it is implicit, but I'm going to make it explicit -- in this process that the parties would be entirely at liberty to reference what the witness statements say.

That would always be subject to the witness being called and if the witness isn't called, then a line will have to go through that stuff and of course the witness standing up when they

give evidence. These things are all givens, but we read the witness statements before trial anyway, we take them into account. We naturally know it isn't evidence until the witness comes into the box and is cross-examined. But it's madness to think that we don't look at these things before the trial starts, so we would expect, to the extent that there is a controversy, for that to be articulated by reference to these documents.

I don't know if that assists or multiplies your concerns, but I thought it would be helpful to just interject as to how we see the process working on these different areas.

MR O'DONOGHUE: Well, sir, that is very helpful and in particular, if it can be clarified that one or more witnesses dispute this in fact, that is helpful. But, sir, in a sense, it highlights my concern because unless and until cross-examination is completed, more or less on a line by line basis in a witness statement, we don't actually know what's disputed and where it takes us. The point I make is twofold. One, where there are matters of evidence, there are tangible limits as to what extent the areas of controversy can be safely delineated pretrial, and second because of that, there is some inevitable risk of mission creep.

I make that point in particular in the context of evidence, but my third point of the five is that there is a fundamental dispute arising in Mr Brealey's appeal, my appeal and by implication Ms Ford's appeal as to whether in fact there was any agreement, any relevant agreement at all, and if we're right on that then it's the end of the agreement side of the case for those parties.

We have set out over 60 pages in our Notice of Appeal -- Mr Brealey has done something similar, he has a 61page factual chronology in annex 1 of his -Notice of Appeal -- we have put in 105 pages of witness and expert evidence, Mr Beighton, Mr Sully, Ms Lifton and Dr Newton, and fundamentally there is a head- on- denial that in fact there was any agreement at any stage over the course of what is termed periods 2 and 3.

That is an old-fashioned "he said she said" commercial trial. We have put all of our cards on the table at some length. Mr Holmes, whoever it is, will have to make an election as to what exactly he cross-examines on, and given that that is an old-fashioned disputed fact in a Commercial Court sense, we do have significant concerns of principle and practicality as to what extent at this stage we can or indeed should be required to short circuit or trim down that overarching dispute pretrial.

We say as a matter of principle, we have put our cards on the table. As a matter of fairness and process the way that that issue in particular must be resolved, and we say can only be resolved, is through hearing the witnesses. We think in particular that the risk of mission creep on that, given the issue is purely factual and is writ large in ground 1 of our appeal, is very, very substantial. That may well be an outlier, sir, in the process you have mentioned, but it is something potentially very important.

THE PRESIDENT: No, let's unpack this a little bit because I think it is very important and I think we need to consider these points because they matter and they matter because I want, if we go forward with this, all of the parties to be satisfied that they're going to get a fair hearing. What you're saying is that you are concerned that there is going to be a movement into deciding things from purely articulating where the dispute exists.

But let's be realistic here. You've described documents of considerable length.

MR O'DONOGHUE: Yes.

THE PRESIDENT: At some point in time, the Tribunal is going to have to synthesise what each party's case is -- going to have to do that, there is no escaping it.

MR O'DONOGHUE: Yes.

THE PRESIDENT: You're saying do it all after judgment. The problem with that is that actually the questions which the Tribunal might really want to probe only become apparent in the process of synthesis.

Now, what I am suggesting is not that you be closed out from making any argument you like. What we want though, is we want a sense of where the battle lines are drawn. That would involve not a cutting and pasting and inserting into the judgment of all 106 pages of Mr Bloggins's statement. What we want is an articulation of -- if it's a chronological run, what each person is saying about each particular document. Not in great length, but in sufficient length so that my interested observer can understand what the battle lines are drawn.

Now, of course given that this would be a synthesis of what your witnesses are saying, if they come up to proof, then the writing of what the outcome is, likely to be relatively straightforward and there would perhaps not be very much violence having to be done to the articulation of the history in deciding the point.

If, on the other hand, your witness crashes and burns and hypothetically speaking sobs in the witness box saying, "It's all a pack of lies", well, then no doubt the draft will no doubt have to be comprehensively rewritten, of course. But that's the nature of the process, but all of that is I think going to the fact that all we're trying to do is actually to give the parties a perspective of where the fault lines of dispute lie so they can focus their fire on the points that matter, because we're not going to want to have enormous amounts of either submission or cross-examination on points which are violently agreed by both sides.

What we want to enable everyone to do is to say: this is a point where, for instance, there may have been a meeting at some point where there is divergent recollection and inadequate documentary evidence. That would not be resolved in the draft, it would be articulated as a problem.

MR O'DONOGHUE: Sir, I understand. To be clear, what I am saying is that in Mr Brealey's Notice of Appeal and my Notice of Appeal and in his annex 1, we have done this exact exercise covering a period of many years. Now, it is necessarily detailed, that's not our

fault. We essentially dispute each and every factual finding in the decision, there was an agreement straddling so called periods 2 and 3. We say we have done that exercise through the pleadings and the evidence-in-chief. For our purposes, the battle lines are drawn and our cards are on the table.

Now, it is a matter for Mr Holmes or whoever to decide which parts of that account they dispute and in my submission, the way the adversarial process works for pure questions of fact is that that dispute, once articulated through pleadings and evidence, takes place at trial. What we don't do is have a sort of a bit of a go pre-trial at seeing which parts of the dispute we can take off the table. We dispute the entirety of the agreement for all the relevant period.

THE PRESIDENT: Yes, I understand that. I confess I fail to see the problem because the judgment is going to have to say what each party says about the point. That's the point about the cards on table approach. You put your case, Mr Holmes has the position in the decision, we need to synthesise both those points without articulating what the answer is because the answer only becomes apparent after the evidence.

So you can take it as read that all we are trying to do is to understand not who's right or who's wrong but what the question is. I mean, you may of course, Mr O'Donoghue, be right that it's not possible pre-trial to articulate what each party's position is without getting into what the outcome is.

If that is right, I think you can take it that we have enough self knowledge to see that happening and then we will have a no go in July rather than a go. But I hear your concern. I confess I think it is overstated, but I can't dismiss it out of hand. All I can say is we will keep it very much in mind as a concern that you have articulated.

MR O'DONOGHUE: Sir, I'm grateful and it is no more than a concern at this stage. But if one thinks of this in terms of conventional Commercial Court trial, one would of course in most cases have a neutral chronology, but it would be wrong in principle to have

a pretrial document on a contested question of fact where the witnesses of fact have put forward admissible evidence-in-chief and have yet to be heard essentially outlining, perhaps in some detail, what exactly is the nature of the dispute between the claimant and the defendant. That would be an inversion of the normal adversarial process for dealing with factual evidence.

As I said, sir, that may well be an outlier. I can see our questions that are mixed law, fact and policy and assessment that it may well be different. But on a hard edged question of fact, primary fact, we do have concerns about an intensive pretrial process intended to, for want of a better phrase, get a preliminary handle on the potential outcomes of factual disputes.

There are two final points very quickly. In terms of options 1 and 2, in principle we favour cutting the Gordian knot and separating out liothyronine at this stage for all the reasons that have been canvassed in writing.

There is one practical issue I wish to raise, sir: a table of availability was handed up yesterday.

THE PRESIDENT: Yes.

MR O'DONOGHUE: As you will see, half of the parties in liothyronine, the CMA and Cinven would not be available in June and July.

THE PRESIDENT: Yes.

MR O'DONOGHUE: By contrast, sir, we would have full availability for September, October, November and December so, subject to that potentially important caveat, we favour getting on with liothyronine.

A couple of final points --

THE PRESIDENT: Just to test you on that: one of the reasons why we went for July or June for liothyronine was because, first of all, it seems to be doable to do the hearing as early as that and that intrinsically is a good thing, simply by reference to the end-to-end time that these appeals ought to run.

Secondly, we felt that having these two appeals in close proximity to one another would be quite dangerous because of the burdens it would impose on counsel if they were being run separately.

Now, if they were being run together as one process then obviously the presence of an overlapping counsel team for both appeals is a positive advantage, but if you are running two separate appeals where actually the overlap between appellant representation is quite considerable where, in effect, the only non-overlapping party is Hg, that, it seems to us, would constitute a bit of a problem and rather tilt in favour of our option 2.

So I think there was reason in which we articulated a date for option 1 before the summer and that was the reason, and I put that on the table again so that we can hear your response to that.

MR O'DONOGHUE: Sir, as I said, the problem really is a practical one but a significant one. I have been involved in these proceedings before the CMA for many, many years. If possible my client would wish that they can continue with the team they have had for many, many years.

THE PRESIDENT: Sure.

MR O'DONOGHUE: Obviously the CMA's position is that that is a serious difficulty. So, sir, if I am shunted towards option 2 purely for that pragmatic reason, so be it. I mean, Mr Brealey and I are the ones who are most involved in terms of both sets of proceedings. The CMA has a slightly different team for both proceedings, and if he and I are willing to roll up our sleeves and get on with things, if there is some degree of proximity, then on our heads be it; that's a risk we take on board.

So, sir, I realise that may not be very helpful. We want to get on with liothyronine. For practical reasons June and July would not work for half of the parties. To the extent it

helps -- and it may not help -- we can do it at any stage in September, October, November, December.

Sir, finally before I wrap up on costs, we do have a concern that, first of all, as things stand the CMA takes the view that even if we succeed we will not recover a penny of our costs. Mr Brealey is trying his utmost to undo that unsatisfactory state of affairs in the Supreme Court in February but, as things stand, they will argue we can't get a penny back even if we win.

On a sort of "back of a fag packet basis", today's CMC is probably likely to cost a total of a million pounds. If we have a number of CMCs, one can see that multiplying. If there is some risk that we get to a go/no go in July and the whole thing get abandoned then those costs, which would be substantial, will be wasted and, finally, we do firmly take the view that a substantial frontloading of iterative documents, seven, eight, nine drafts of the ambulatory judgment on which we will comment, it is bound to lead to a significant spike in costs and we just see no way in which that would be cost neutral for all sort of reasons, and the very reason the Commercial Court has avoided anything which looks like a detailed list of issues is precisely because experience in probably thousands of cases has shown that this tends to wrap up costs on a very, very significant scale.

We have a very large number of parties, many issues are hotly contested, there will be an instinctive reaction of many people not to give ground unless they have to, and it's not that any of us are particularly disagreeable, I think; it's just the nature of the process. The stakes are high and with the best will in the world there is no doubt that costs will be, in my submission, materially greater. Many may be abandoned and they may not be recoverable depending on the legal position at the time of judgment, so we say that costs are not a neutral factor or a trivial factor; they're actually quite fundamental in terms of the entire process.

Thank you, sir.

THE PRESIDENT: Thank you, Mr O'Donoghue. Again, just to flag up a point in response to those helpful submissions: we are very conscious about the question of costs and we appreciate the asymmetry that exists in terms of costs recovery, but the reason I articulated the costs sanction point was partly to act as an incentive on parties playing nicely but, more to the point, as a device for sending a message.

The parties quite rightly are alive to the danger of the ambulatory draft being seen by the outside world as more than it is, and we will seek to deal with that by way of health warnings and things like that, but it seems to us that the costs sanction, where one says: look, you have incurred these costs but frankly we're going to cut them down and render them irrecoverable will be an effective threat so far as the CMA is concerned. It may be less of an effective threat so far as the appellants are concerned because they don't get their costs anyway, as matters stand.

But, as a signal, it seems to us to be helpful so that we can say, and in a fairly graphic way illustrate, our disapproval of the way in which the drafting process has been done by saying: well, this particular section you say cost you £200,000 to put together. You're going to get 10. That, I think, sends something of a signal.

We would only use it in cases where that was justified, but I think it would mean that the extent to which third parties could read greater significance into the ambulatory drafts than they might otherwise do is assisted in that way, but that does lead me to the final point about costs incurred that are irrecoverable.

The reason why we would want a light touch process on the drafting process and not a formalisation of unanimity is precisely because of costs. If you start getting into a process where there is a cottage industry growing up whereby each section has to be agreed down to the last semicolon and full stop then you have a problem, and that's why

we see this as something which one party has to be given the pen to, but it is a pen that is ultimately subject to two controls:

One is the need to take into account what other people say, and we would expect the parties to engage, but not in a formal way; we don't want a process of: here's my draft, please send your comments by two weeks hence. We would want an informal engagement: one party submitting or set of parties submitting a section which would then be subject to a pretty intensive review of the Tribunal's own part to turn it into something which the Tribunal regards as provisionally acceptable.

And, if I can be absolutely clear, we would be stipulating that any draft would be tied back to the documents in the case, be it witness statements, be it pleadings, and would contain, to the extent that the document is in the database, a database reference, so we would expect there to be an audit process, as well, so that when the section says: as the letter of 15 September says, and it says something which is slightly surprising, we would go back, we would have a look at it and think: hmm, I'm not sure that's actually what the letter does say, so we expect there to be pretty tight controls, even aside from the fact that these are ambulatory drafts that will be revisited on a number of occasions, to ensure that parties don't go off-piste.

So that was in answer to your question of costs. We don't see this as the sort of hugely expensive process that an all embracing list of issues that is agreed by the parties involves; we see it as far more constructive and lighter touch than that, so I say that to assist those who come after you, but if you have anything to say in response, Mr O'Donoghue, of course we would want to hear you.

MR O'DONOGHUE: Well, sir, no. I mean, in a sense we will be the guinea pigs and time will tell.

THE PRESIDENT: Time will tell. I fear that is right.

Mr Palmer.

MR O'DONOGHUE: I see the time.

THE PRESIDENT: I'm very grateful. Should we rise now, but I'm very conscious that we have a lot to get through and I don't want anyone to feel under any pressure. Should we resume at 1.45?

Mr Palmer, in that case you have been given a break by Mr O'Donoghue's careful looking at the clock, so we will start with you at 1.45 and we will leave the courtroom now. Thank you all very much.

(1.02 pm)

(The luncheon adjournment)

(1.45 pm)

THE PRESIDENT: Good afternoon, everyone and welcome back.

Mr Palmer, over to you.

MR PALMER: Thank you, sir. We endorse option 1 of the two options that you outlined, sir. In short, in view of the prospect of the immediate split between Hydro and Lio, which we say has much more to recommend it than would suggest keeping them together, you have already all the written submissions about how little there is in common, in fact, between those two appeals and how marginal the overlap is.

There are substantial concerns that we have about having the two hearings together in any sense intertwined, at least, or heard concurrently. That would inevitably mean that we all, whether or not we were in Lio or Hydro or both, we all have to be across both appeals to understand the significance of submissions which were being made by parties who are common in both appeals and what significance they have for us in our own appeal. It would add substantially to the amount of work and complexity for no real gain.

Further, option 2 as you described it, sir, would leave the matter unresolved until July with the dates for the trial in November/December still potentially at risk with potentially only Lio going ahead, and presumably some other dates having to be kept available as well.

It all leads to additional costs and inconvenience to the parties to no real substantial gain. As we all submit, Lio can be heard separately from Hydro with no real loss.

So option 1 commends itself to us for that reason, sir. Indeed, to the extent that the Tribunal does adopt a procedure which may be viewed as in any sense experimental, this complication of having two being heard together may be an experiment too far, and the experiment may best be tested in a simpler environment.

The second main submission we make to you, sir, is as to the role of the ambulatory draft and in particular as to the Tribunal's role in it. So there is a tension, as we see it, between the various purposes which such a draft could serve and the Tribunal's role in fulfilling those purposes.

To take the positive side, as we hope we constructively suggested in our skeleton arguments and you were kind enough to refer to our suggestions earlier as being so constructive, we saw a number of precedents in which parties have collaborated together and in particular in the (audio distortion) view by the court of the production of what in those proceedings was referred to as a statement of common ground, but with a draft statement being provided to the court and then going through further iterations in light of the court's reaction to it before a final version was produced.

Now, sir, we heard you say, and I certainly accept that what you have in mind in this case is something more ambitious than simply a statement of common ground, and we endorse that as well. We see the value in having the battle lines, as you have put it, drawn and spelt out in full by reference to the non-contentious facts and the contentious facts and where matters are contentious, the essential position lying behind the issue being drawn out further from the parties, so an understanding of what it is that divides the party on that issue, whether that's an issue of disputed fact or an issue of law as the case may be.

It might be that that could be referred to, such a statement could be referred to, in terms similar as appear in Mr Holmes' skeleton argument, as an expanded statement of facts and

issues which fulfils all those purposes which you have outlined, sir, and which you would like to see fulfilled in advance of the trial actually beginning. To that extent, we fully support the Tribunal's proposals, but where we have more difficulty is the role which the Tribunal plays within that in producing that draft and in reacting to drafts which have been in the first instance produced by one party or the other with whatever level of informal cooperation behind the scenes as may have been provided by the parties.

And this is where the tension comes in, sir, because you have been crystal clear this morning, and we are grateful for it, that the purpose of the Tribunal's role in this production will not be to decide any issue which is disputed; it will not be a draft judgment in that sense. But we did note, sir, in ambulatory draft 1, it was nonetheless referred to as a draft judgment at paragraph 34, and you contemplated at 37(6) that the drafts can and would change over time and you said including quite possibly substantial changes of mind on the part of the Tribunal. We were concerned to see that because to us that suggests, despite what appears in paragraph 38 as you pointed out earlier, sir, that issues would be demarcated rather than resolved. We are concerned as to what substantial changes of mind the Tribunal might have and in particular in response to competing reactions from various parties as to what is being produced in this ambulatory draft.

That is where we see the tension, sir, with on the one hand the Tribunal's entirely correct recognition that it wouldn't be right to decide any issue in advance of the trial, but at the same time to be reviewing what the parties have produced and expressing a view upon that in circumstances where the parties are simultaneously being invited to make representations as to whether something should or shouldn't be included, or if it is included in what terms, because it's in those sorts of representations that one finds that genuine contentious issues can manifest themselves. And of course it can always be possible to resolve that to a degree by saying: well, there is an issue between the parties

to the following effect and the CMA says X and appellant Y says Z and just to expand the level of disagreement and explanation for that.

But even that's not so easily done when the real issue between the parties as to the relevance or significance of what may be otherwise entirely uncontentious facts, but whether those facts are at all relevant to market definition or to dominance or to the existence of an abuse as the case may be and the relationship between the parties as to whether something should be referred to at all. If the Tribunal were to be forming a view about that sort of matter: is this matter relevant, is it significant, then the Tribunal is being sucked into quite dangerous territory, I would say, which would be at least in friction or in tension with the avowed attempt not to decide anything until after all the evidence has been heard and submissions have been heard at trial.

So our solution to that, sir, would be a sort of hybrid between what I would call the Heathrow Hub approach and the approach you have outlined, which is essentially for this document certainly not to be an ambulatory draft judgment but to be an ambulatory draft expanded statement of facts and issues, which is ultimately in the hands of the parties but at all times subject to the Tribunal's review so that, for example, the Tribunal could quite properly say, "I want a draft by this date", the draft is provided as at that date and the Tribunal looks at it and says: well, this draft conflates what appears to us to be two different issues here, can you draw those out, or it appears to us that an issue has been swept under the carpet here, can you put it out please and explain your position on this, CMA, or your position on this, Intas, because it's not clear at the moment. This draft has not yet dealt with something which we were expecting to be dealt with by this stage and to identify what it is and send it back to the parties.

Now, we fully accept that it would be unrealistic to say all parties, six different parties, different appellants, you know, different appellants' cases are often in tension with each other appellants' cases, Intas' appeal raises very different issues to any of the other appeals.

It's quite reasonable for you to anticipate, sir, that there is never going to be a point where everyone has agreed every dot, every comma, every semicolon.

But all the more reason, I would say, for this to therefore remain in the hands of the parties than the Tribunal ultimately at this stage. The parties who perhaps by means of colour-coded highlights where there are disputed sections indicate that okay, these facts are uncontentious or are agreed, but yellow highlight shows that Intas doesn't accept that those are at all relevant to the issue which the CMA wants them to be included here in respect of, for example, things which would sit oddly in an ambulatory judgment of the Tribunal. But as a working document which the Tribunal would then be able to draw on, reach a view on, resolve those differences after hearing all the evidence, take away the highlighting, slash one paragraph and adopt another, something which will be of real practical use to the Tribunal in producing its judgment, we entirely endorse.

What we are very fearful of and sceptical of is a world in which the Tribunal can take ownership of this document and start saying what would make the cut, what wouldn't make the cut in circumstances where one party is saying: well, no, this is relevant or this is not relevant; this is significant or this is not significant; this needs to be done or not done as the case may be.

Even if the Tribunal were able to reach a point where it simply is just a neutral statement of what the areas of agreed and not agreed facts and issues are, again we see no real reason why that isn't something which couldn't be ultimately left in the hands of the parties as a document for the assistance of the Tribunal, rather than a Tribunal document for the assistance of the parties, which almost seems to be what is suggested at some points in ambulatory draft 1.

So that's our practical suggestion. It's a way forward. What that would entail is it would not be published, it would be a working statement, a working document akin to a pleading in terms of its status or evidence which is not published at this stage. We would say,

sir, despite the interests and transparency of what the Tribunal is up to generally, we would say there is real advantage in not seeking to have half-formed factual documents put out in public on a working basis before the Tribunal produces its final judgments. There are a number of reasons for that. To the extent that something is contentious, it may well operate in the public arena to the prejudice of that party. Whatever, with respect, health warnings are put on the surface of that, it won't stop reporting by others, at least absent a direction preventing such reporting.

Secondly, it would mean that every single iteration of the ambulatory draft would have to go through the confidentiality checking procedure to ensure that no confidential information is put out and some of the data, or at least the significance of the data which are most in issue is of a confidential nature, so it would avoid that problem at all.

We are also concerned to limit the number of iterations through which a document, whatever its status, whatever its ultimate ownership, goes through. You mentioned the potential for seven, eight, nine and insofar as there is the potential for review and iteration, we welcome that. But seven, eight, nine seems to us a lot, particularly if it involved requiring the parties to react in inevitably fairly short time periods -- if they were seven, eight, nine it would be every few weeks, in essence, which requires a full team to be working on this appeal throughout the year, fully manned and available and reserving availability to do that. Although that may not be a direct concern to the Tribunal, it certainly is a concern to our clients at least. The resourcing of this appeal is of fundamental concern to it- and it does appear to us that that is likely to put costs up, not come close to the Tribunal's ambition that it might even reduce costs.

On this basis, on this option 1, we still have a three to five week trial at the end of the process and the costs associated with an up to five week trial will be incurred in any event. Front-loading some of that work won't avoid any work, but this sort of review and

ambulatory draft and early resolution of and bringing out of these issues is likely to add cost rather than detract.

Now, we don't see that as an objection to the Tribunal's overall ambition that you should end up with a working document which is of real utility to the Tribunal in resolving the many issues which arise in this case, but we do think it is a reason why there should be some discipline over the number of drafts which are brought forward and a limit to that.

Relatedly, we don't view the possibility of costs sanctions as being particularly meaningful or helpful in this stage. There are a number -- in the ordinary event, were the Tribunal to consider a costs order at the end of proceedings, it would take into account a number of factors and reach an overall judgment, and we would fear that it could be artificial to isolate costs in respect of this process and award costs sanctions based only on a particular party's conduct in response to the production of that particular document. It ought to be seen, we would say, in the context of the whole appeal at the end of the process, otherwise we're going to have additional cost, producing cost statements in response to every iteration as well, and we don't welcome that.

The last point I would raise at this stage is just as to the timing and the relationship with the pleadings. There is already an order for replies to be served next month. They are under production and will be served next month. We would suggest that whatever process the Tribunal does adopt, it kicks off following the close of pleadings. The pleadings do, despite the fact that they don't crystallise issues in the same way that would happen in ordinary civil litigation with particular facts being admitted or denied as the case may be, they do still serve a useful purpose of identifying the list of issues you asked to be produced and very close cross-reference to the pleadings, both the Notice of Appeal and the CMA's Defence, and room in the table for cross-references to reply as well. That would be a very useful first stage in producing the expanded

statement of facts and issues in due course, so we would suggest that that process comes to an end and that this new process picks up afterwards.

So I hope that's of some assistance for those other points which we would seek to make.

THE PRESIDENT: Thank you very much, Mr Palmer.

Obviously you don't have a view about the timing of the split of liothyronine case because you're not in it, so you are making the perfectly valid point that from your point of view, if we are running an experiment, it should be confined as simply as possible so that the propensity of damage, if it goes wrong, is limited. I think that's your point.

MR PALMER: In part, sir. Not just the propensity of damage, it was just the complexity and time it would take to run it. It seems to me to be complexity squared when you have two appeals being run together and each party having to be aware of what's going on in the other. If it's split off and managed entirely separately, that simply won't arise. So it's not just a propensity for things to go wrong; it's the propensity for things to go right.

THE PRESIDENT: Yes. I mean, I suppose just so that everyone knows where we're coming from, we accept that these two sets of appeals are not such that there is a powerful point in favour of hearing them together. So I think that's common ground across all of the submissions we have seen.

The reason we addressed the two together was simply because of the broad factual synergy. They're both pharmaceutical cases, to put it no higher than that, combined with the overlap in legal teams which made us think that if one is going to do a radical new process, it might actually assist to have both sets in. But the points you make are entirely right; I think for our part we place a little bit more weight on things going wrong rather than it being procedurally unnecessary to deal with it that way. But the reason we think that is because we are maybe foolishly a little bit more optimistic that this sort of process will actually assist in the dealing with two complicated, albeit only tangentially related, appeals together. But I think you can take it that we see

considerable force in the point about if one is going to try something novel, one should restrict the novelty, the consequences therefore of that novelty going badly wrong to a logically confined case.

MR PALMER: Yes.

THE PRESIDENT: Thank you very much, Mr Palmer.

The only other point I would want to make clear: you said, and I quite understand why you said that, a three to five week trial. I want to be quite clear that this is a three week trial in November with two weeks in case things go wrong. I would want the parties very much to bear in mind that we don't want them, as it were, to regard this as an automatic flexibility to the period. It's going to be very hard to avoid that sort of thinking, but we do really want to stress that the reason we are articulating this sort of new process is because we are very troubled by the length of time it's taking to hear these matters, and therefore of course the length of time it takes to write a judgment thereafter.

Now, you may very well say that's because these decisions are in relation to complex matters and they're very long and that's I'm sure a fair point. But please do, we invite all parties to think of three rather than five weeks. The two weeks are going to be there, but they're a failsafe.

MR PALMER: Sir, yes, that's understood. I haven't expanded on this. We have said it in writing that three weeks is (audio distortion).

THE PRESIDENT: We entirely understand that you are saying -- Mr Palmer, you are in and out, I'm afraid, in terms of your connection.

(Pause).

It sounds as if it's at our end. Am I coming through clearly now?

MR BREALEY: You are now but you weren't before.

THE PRESIDENT: I wasn't before, right.

Well, all I was saying was we fully acknowledge that looking only at the hydrocortisone appeals, the consensus is five weeks is doable on, as it were, a conventional trial, but no less; we hear that.

What we are saying is that if we go down the option 1 and split off liothyronine to be heard separately, we would give three weeks, but we would very much want the matter to be dealt with on the novel process, if we go down that way, in three weeks, and we're adding two weeks after that hopefully as judgment writing time, but they're in case things go badly wrong really in the way that the CMA suggested in their written submissions; that because we have a new process, the risks of it going wrong need to be catered for.

All I was saying I quite understand where you're coming from, Mr Palmer -all I was saying was I would want the parties to see this as three weeks, question mark, plus two, not three to five weeks. It's- a small point but I think an important one.

MR PALMER: Sir, that's quite understood. Our position remains that we think it unfeasible to do it in less than five weeks, but your point has been entirely understood and heard. The only thing I would add is the possibility at the PTR when whatever process is adopted will be further developed, it may be we will have a more accurate sense of what will and won't need to be dealt with at trial and therefore how long it might take.

THE PRESIDENT: Entirely agreed, Mr Palmer. What I said about go/no go earlier would apply even if it was a go/no go in relation to hydrocortisone alone. In other words, end of July we would say can we do it in three weeks, can we do it in five. Trial timetable would obviously be front and centre.

MR PALMER: Thank you, sir.

THE PRESIDENT: Thank you very much.

Mr Brealey, I think you were next.

MR BREALEY: Thank you, sir. Advanz endorses basically what Mr Palmer has just said and endorses the concerns that Mr O'Donoghue raised. On the main point, I would like just to put some context and colour to the concerns, if I may.

As you will know, Advanz is the appellant that has adduced three factual witnesses and several annexes setting out in chronological form the facts.

If I can go back to paragraph 18 of our skeleton, I just want to refer to a few documents, actually --

THE PRESIDENT: Yes, of course.

MR BREALEY: -- which is the paragraph that you cited, sir --

THE PRESIDENT: Yes.

MR BREALEY: - where we thought it would be enough (inaudible) to advance if there was a process which had at its starting point for inclusion in the draft judgment the CMA's statement of -fact - and I emphasise those words, "statement of fact" - in the hydrocortisone decision which is said to support an unwritten market sharing-agreement.

And you fairly said, sir, well, the pushback is there would be no agreement as such in the judgment. But what I want to emphasise is the reference to the CMA's statement of fact. So it's not whether there is an agreement, it is how, what is the factual foundation for that agreement.

Could I just quickly take you -- I understand that Mr Palmer is the only one who doesn't have the annexes, everyone else has the annexes to our Notice of Appeal, but it's not going to prejudice him because I'm not going to refer to any -- in any detail.

If we have the annexes to hand --

THE PRESIDENT: Do you have a bundle reference, Mr Brealey?

MR BREALEY: I don't, but the witnesses statements were sent -separately and are in bundle 4. The annexes were sent separately to the Tribunal and I don't- think they formed part of the bundle because Mr Palmer is not yet in the confidentiality ring.

THE PRESIDENT: Right, in which case --

MR PALMER: I am fine, please don't stop on my account. I am in the confidentiality ring and I do have your annexes.

MR BREALEY: You do now, okay.

THE PRESIDENT: In that case, I think the only people who don't have them in court are the members of the Tribunal because we have the papers before us electronically and unless these materials are in bundles 1 through 4, I don't think we have them to hand.

MR BREALEY: And they haven't been delivered to the Tribunal?

THE PRESIDENT: They may well have been. That's something I'm afraid I'm not able to assist on at the moment.

Right, so it's just me --

MR BREALEY: It is quite important that we --

THE PRESIDENT: No, we will -- if it's important, we will get them up.

MR BREALEY: Thank you.

(Pause).

THE PRESIDENT: Right, okay. I'm going to have to rise because I'm afraid the email on this machine gets me through to Mr Justice Morris' inbox which I don't think will help anyone.

MR BREALEY: No. If you could, sir, I would be very grateful.

THE PRESIDENT: Of course. Give us five minutes. We will leave the courtroom now and we will sort this out so that you can carry on. So we will be back in five minutes. Thank you.

(2.16 pm)

(A short break)

(2.26 pm)

THE PRESIDENT: Mr Brealey, we have the documents now. It took a while for the system to let us in, but we have them.

MR BREALEY: I'm very, very grateful, thank you.

So as you know, the Hydrocortisone appeals were about whether there was a market sharing agreement and in our Notice of Appeal, we have set out the facts in their true chronological order.

If you can go to annex 1 first --

THE PRESIDENT: Yes.

MR BREALEY: -- there are five annexes and four witness statements, and this is relevant to the submission I am making about paragraph 18 of our skeleton about the CMA's statement of fact.

Annex 1 sets out in some considerable detail all the documents relating to AMCo's -- that is Advanz's -- continued endeavour to enter the market. We have flagged in our skeleton, if one wants to go for example to paragraph 30 of annex 1, so remember that the key allegation is whether there was any sort of attempt to delay independent entry. As we set out in paragraph 30, and I don't want to make submissions, but it is extremely important --

THE PRESIDENT: No, please go on.

MR BREALEY: -- for the Tribunal to understand the context.

So as noted above, this is paragraph 30:

"AMCo did not exist until March 2013. 20 December, post acquisition, Amdipharm confirmed to Aesica [Aesica is a developer, the manufacturer]: "It was agreed at last week's project support group meeting to manufacture a 10 mg hydrocortisone batch as quickly as possible."

This is our submission: this document shows very early on the new owner's -- Cinven -- tablet as a priority.

We go over, 31, the CMA makes no reference to this project support group meeting, nor to the reference "as quickly as possible". Remembering that this is an allegation we are delaying and we say this is appropriate given the allegation of delay.

I won't labour the point, but 32 and 33 is along a similar vein. On 17 January, just after Christmas, there is another contemporaneous document which refers to trying to get the hydrocortisone tablets and we see "ASAP", and again that is ignored in the decision.

So this is annex 1 and it is in some detail and, as Mr O'Donoghue says, here Advanz is setting its cards on the table, to adopt the Tribunal's phrase.

We then have annex 2 --

THE PRESIDENT: I'm so sorry, Mr Brealey, can I interrupt here because I just want to see if there isn't some huge misunderstanding about what we're envisaging here. Sorry if I'm interrupting unfairly, do go on.

MR BREALEY: Well, I won't labour the point, but what I would like to do is just three or four minutes, tease out our concern.

THE PRESIDENT: Okay.

MR BREALEY: And then if possible the Tribunal can say we're under a complete misapprehension and all our fears are groundless.

Annex 2 refers to a chronology about Advanz's, AMCo's, concerns as to the contestability of the market. So as the Tribunal will have appreciated, there is a difference between the adult's version and the child's version, and Advanz only had an MA for the child's version and the question is whether the market for the adult's version is contestable.

Annex 3 is called Project Guardian and refers to the strategy to exclude Advanz from the market, from the adult's market, again going squarely to whether there was an agreement. Annex 4 has the pharmacy and wholesaler responses, and annex 5 has

market contestability and suppliers, these are the third party suppliers.So there are five annexes here of -- essentially they are contemporaneous documents or evidence on the CMA's case file.

Before I just go to the ambulatory judgment, can I just go to bundle 4 and the witness statements Mr O'Donoghue has referred to.

THE PRESIDENT: Yes.

MR BREALEY: So this is bundle 4. In the first tab, there is a witness statement of Kelly Lifton. Now, she was the person at Aesica, the developer, who was dealing with Advanz, AMCo. Again, I don't need to labour the point, but look, for example, at her evidence at paragraph 38, page 11 of her statement.

THE PRESIDENT: Yes.

MR BREALEY: Where she says:

"My experience and my dealings with AMCo [that's Advanz] was that it was always trying to push the development and manufacture of its 10mg product along as quickly as possible and became very frustrated with our inability to provide a saleable product."

And that's going to be clearly an issue, and Mr Holmes or other may cross-examine on it, but that is her evidence.

Then at tab 2, and I will take this as briefly as I can, we have the witness statement of John Beighton. He was the CEO of Advanz and he is named in the decision as being aware of this market sharing agreement. We then have the witness statement of Robert Sully, who is the General Counsel. So we have gone to great lengths to put forward what we say is the accurate and fair portrayal of the evidence and we say that section 3 of the decision which sets out the CMA's version of events is unfair. I can use other adjectives, but unfair and inaccurate.

When it comes to the Defence -- so we have put all these documents before the Tribunal and when it comes to the Defence, and if the Tribunal would just pick up the Defence, this is the consolidated Defence in the hydrocortisone appeals --

THE PRESIDENT: Yes.

MR BREALEY: -- which is the second bundle, 2F, tab 2.

THE PRESIDENT: Yes.

MR BREALEY: From Advanz's perspective, from Cinven's perspective, the CMA simply does not engage with what we have set out in those five annexes or those three witness statements. So, for example, if one goes to paragraph 93, which is at page 96 of the Defence and consolidated Defence.

THE PRESIDENT: Tab 93, just one moment.

MR BREALEY: Paragraph 93.

It unquestionably is a superficial, if almost non-existent treatment, of what we have set out in these five annexes and three witness statements. So 93:

"As summarised in paragraphs 57 to 60 ..."

So they have summarised what they regard as the contemporaneous evidence, essentially four paragraphs. They say:

"The contemporaneous evidence demonstrates that AMCo did not seriously engage with the development of its own 10mg tablets."

Et cetera. Again, this is a submission, but my point is the chronology that we have set out for example in annex 1, where we have put our cards on the table, has not been dealt with in any serious fashion by the CMA.

So that then leads us to the Tribunal's judgment, and if I can then just articulate what the concerns are. I think some of the concerns have been slightly allayed, but I think in discussing this with a few of the parties over the luncheon adjournment, I'm afraid we still lack a little bit of clarity in what is envisaged in this process.

So if I can go back to the judgment, sir --

THE PRESIDENT: Yes, and please don't call it a judgment.

MR BREALEY: Okay, I will call it --

THE PRESIDENT: It's a draft.

MR BREALEY: -- the AD1.

THE PRESIDENT: AD1, we'll call it that. Again, I know we are all on the same hymn sheet, but this is open proceedings and I think the framing of labels is important. But yes, do go on.

MR BREALEY: So paragraph 34 of AD1 --

THE PRESIDENT: Yes.

MR BREALEY: -- it is said:

"What is required about a week before the hearing begins [so a week before the hearing begins] is what is in effect a draft judgment that sets out ..."

And the AD1 sets out what is expected.

Then we get to paragraph 37.

THE PRESIDENT: Yes.

MR BREALEY: And this is -- what I am about to submit is all with how is this process going to work and how is it going to achieve the Tribunal's aim of shortening the trial timetable and getting everything up to speed before the hearing begins, which is essentially the twin aims of this AD1, which is shortening the timetable and ensuring that everything as much as possible can be set out before.

37 of AD1 --

THE PRESIDENT: I think, though, Mr Brealey, you need to bear in mind the limits of paragraph 34. I mean, you've referred to the words what is in effect a draft judgment and those words are, I entirely accept ours, and unfortunate, but --

MR BREALEY: No, no --

THE PRESIDENT: What the limits of 34.1 are, are really quite tiny. I mean, if you look at what's articulated in 34(i) through (v), it's not even coming close to controversial matters, deliberately so.

MR BREALEY: I skirted over 34 because you don't find much of that controversial.

THE PRESIDENT: No, indeed.

MR BREALEY: What I do find, with the greatest respect, to be more controversial is 37.3 to 6, which is essentially the process which is proposed. So:

"The parties should expect the Tribunal to take a critical approach to material submitted, to regard the ambulatory drafts as its work [that's fine] not merely the incorporation of the parties' efforts. The parties should approach their drafting in this way."

So the first point -- and this is something which all the appellants have raised essentially:

"We do not envisage any formal process of inter partes review of the drafts."

So if anybody is holding the pen and when it comes to the facts, as we shall see, the CMA appears to be holding the pen, the Tribunal will look at it critically, but there is not envisaged to be any formal process of inter partes review.

Could I then go to subparagraph 4?

THE PRESIDENT: Yes.

MR BREALEY: Where it is said in the second sentence:

"We intend to proceed on the basis that statements of fact in the decision can and should be adopted by the Tribunal unless specifically challenged by a party, in which case evidence will be required."

Now as a statement, that's fine, but we submit in order for this process to have any value at all, the CMA have to engage with the documents and the facts as set out in the Notice of Appeal because the AD1 goes on, of course:

"The price for being the finder of primary fact for the CMA."

Well, we say the CMA actually on appeal is not the finder of primary fact, it's the Tribunal. I will come on to 6 in a moment, but the thrust of my submission, and I think the concerns that Cinven articulated, is that if this process is going to have any value at all, the CMA has to engage with the points made in the Notice of Appeal. It cannot be the case that the CMA holds the pen on findings of fact and does a similar job to what it does in the Defence and in section 3 of the decision, which is essentially to concentrate on its own documents that it says supports its unwritten agreement, is inaccurate and has glaring omissions. And in our submission, in order for this process to have any value, what the CMA should be doing is going to annex 1 and saying: yes, that document is in existence and it is a fair summary of what Advanz is saying.

Because that would be the only way, in my submission, for the Tribunal to be able to say: right, we've got some groundwork before the hearing and it's not then necessary for Mr Brealey in opening to take us through all these documents which do not appear in the decision and in the correct order, because what the decision does, it kind of scatters them around. What we have done is put businesses live in the real life and it is important to see these documents in a chronological order. So that's the first main concern we have as I think you have picked up from our skeleton.

The second then -- sir, you can say that my fears are unfounded -- the second is in subparagraph 6, where it says:

"The factual statements and expert reports will reference an ambulatory draft."

And I'm not sure how that is going to occur, because the final draft will be a week before the hearing?

THE PRESIDENT: Well, yes, but there will be multiple previous drafts, which will be published. I think perhaps, Mr Brealey, it's best if we articulate and seek to deal with your concerns because I think that is going to colour the other points that, to be clear, I don't want to cut you off from making.

MR BREALEY: No, but I think you have my point.

THE PRESIDENT: I certainly have your first point, and there may be others which I will encourage you to make. But I think we need to address this concern head on because let me put it this way: if this is the way the parties think the process is going to work, then it clearly can't work because it's absolutely not what we have in mind.

Now, let's start with what we mean by background facts. I don't regard the nature of what agreement was made as a background fact. What I regard as background fact are the points that Ms Ford identified early on, things like the generic drug industry, things like how orphan drugs operate, the regulatory environment, about which we know at the moment very little, but which we do need to know about simply to understand the context in which the points are made. And it seems to us, but we are very happy to hand the pen over to someone else, it seemed to us that the CMA was probably quite a good place to start for those articulations, but we really don't mind.

Your point -- and I am going to back to your reference to annex 1, paragraph 30, let us take that as an excellent example -- this would be, as we see it, part of an articulation of a chronology that would probably occur after we have ambulatory draft 2 in place. So ambulatory draft 2, which would aim to nail what we call the foothills of the -- and I won't use the word because I vowed not to -- the foothills of the ambulatory draft, what you have in 34.1 are things which are explicitly uncontroversial.

Now, later on when you've identified the issues in dispute, one of which I anticipate will be what was the nature of the agreement that your client is said to have been party to, so we will label that and we will have front and centre: this is a dispute, the CMA say this and it's disputed by the appellant, so the issue will have to be identified as a matter in dispute. One will then have as a separate section not articulated in this draft at all, one will have a drop in, which someone is going to have to draft, and maybe it should be you, saying "These are the documents you need to look at".

If Mr Holmes -- and I think from the few shakes of the head I saw -- thinks he can get away with, if he were wielding the pen, omitting the document referred to in paragraph 30 from the list, then he has another thing coming. It's obviously right that what is intended to be a narrative of relevant documents are not just documents that the CMA think are relevant; nor, for that point, is it the documents which Advanz think are relevant; it has to be all the documents that the parties engaged in this particular dispute think are relevant.

So of course paragraph 30 would have to have the nature of the document put in there. It would not have the last sentence of paragraph 30 because that is exercising a degree of judgment about which I want to hear submissions.

So it may be that the last sentence of paragraph 30 makes its way into the final judgment written post hearing, but that will be after the cross-examination of the witnesses and the hearing of submissions. But it seems to me that the more you show documents of enormous length containing huge number of factual documents, the more important it is that we do a bit of chewing about these documents in a document that puts together what everyone is saying.

At the moment, we have the huge difficulty that the CMA have put in a 1000-page decision, you've put in a series of documents which if you add them all up is probably also 1000 pages. We then have the CMA's Defence, we have your reply coming in, so we will be looking in, what, five, six different places to work out what is going on. It's unmanageable.

MR BREALEY: That I understand, but just take it at another level: we say it is very important that whether there was an agreement has to be looked at all the documents, whether the CMA wants to refer to it, it has to be all the documents, but on a chronological basis. One cannot just take a document two years after the start of the alleged infringement and say "Aha". Somehow it has to be done on a logical and chronological basis.

Now, if the CMA are prepared to deal with, add any documents they want, we think that annex 1 is about as (audio distortion) add one or two documents, so be it. But we believe that the only way this process is going to have any value is if the CMA engage with the documents on a contemporaneous basis because they actually say in their decision that is the contemporaneous documents that support this market sharing agreement. We disagree, but it has to be done on a chronological basis. And that is why - and it's not really done that way in the decision.

THE PRESIDENT: Mr Brealey, I am hesitant at going into the answer to the granular points you have quite rightly raised, but it does seem to me to be litigation 101, The Ocean Frost, you look at the contemporary documents because they matter. And simply to ensure that one's brain doesn't explode, you look at them in a chronological order.

Well, yes. I'm in violent agreement. Where I am troubled, and I don't think we're going to insist this, you say the CMA has to engage. Now that, with great respect, is a matter for the CMA by reference to the documents they have already put in place. We all know that regulators have got quite rightly one arm tied behind their back in that they are defending their decision and they cannot originate new evidence, of course I accept and I think Mr Holmes -- I will hear from you in a second, Mr Holmes, because I do want to see how far we have a meeting of minds and how far we haven't. But for my part on this point, I can see every sense in having a section. Now, whether that will be a separate chronology that will be annexed to the AD or whether it is in the body of the AD, who knows, that's a drafting question which I think I will have to resolve. But clearly we need to get a grip of the documents.

MR BREALEY: Yes.

THE PRESIDENT: But it's how we do that, and it seems to me that all of the parties, win, lose or draw, will be benefitted by the Tribunal having a grip of what the parties say are

the relevant documents so they can get down to the nuts and bolts of matters and work out whether there was indeed an agreement or not.

MR BREALEY: I think we are totally in agreement, sir.

THE PRESIDENT: The CMA has to engage. Well, yes, but if the CMA's position is that these documents, which obviously we have to read, actually say nothing; in other words they don't say what you say in paragraph 30 and elsewhere, well, that's their position. Mr Holmes, I have no idea what your position is, and frankly I don't want to know at this stage, but have I got the CMA's position so wrong that effectively today's been fruitless, or you're accepting presumably that these things are materials that we have to read.

MR BREALEY: These documents in annex 1 are all on the CMA's case file.

THE PRESIDENT: No, no --

MR BREALEY: They're not new evidence, it's not new evidence from us.

THE PRESIDENT: What I was suggesting on the CMA's got to engage point, Mr Brealey, is I think if Mr Holmes was to say: yes, we're going to engage with what your clients have said and here are the following additional points that do not appear in our decision, then you might well have something to say. That's why I am giving you a cherry about the question of engagement. But obviously we have to hear what the CMA say in response to your case. That is right, but we're rushing our fences. The first point is to work out what the materials are.

MR BREALEY: Yes, and that's what we want to ensure: that if there is to be a draft document, we want to ensure that all the documents that we have produced are dealt with and then the CMA can in submission, in their skeleton, say: well, that document at paragraph 30 doesn't amount to a row of beans, but at least it will be there in the draft document.

THE PRESIDENT: Yes.

MR BREALEY: And it should be done on a chronological basis. One cannot --

THE PRESIDENT: Well, as I say, Mr Brealey, I --

MR BREALEY: And that's Ocean Frost, that's the start --

THE PRESIDENT: I have no issues with that as a starting point, but I'm not going to make any direction as to how something which actually is in the future is to be done. What we are trying to work out is that we have a process that is fair and it seems to me that if you ended up with a process where in a factual narrative your documents were not included, then I would be on toast in the Court of Appeal before you could say Jack Robinson. It's obviously right.

MR BREALEY: As long as that's understood and it's a draft document --

THE PRESIDENT: Let's see what Mr Holmes says because I think we're going to be in violent agreement on this. But if we're not, then I think we need to know now.

Mr Holmes, I'm sorry to interpose you, but I think that will be helpful to hear from you.

MR JOSH HOLMES: Not at all, sir, and I think I can set Mr Brealey's mind at rest. Listening to this exchange (audio distortion) the Tribunal is (audio distortion) precisely the process that is described that will (audio distortion) the documents.

(Pause).

Sir, can you hear me?

THE PRESIDENT: I'm afraid we're hearing you intermittently. I think I'm getting violent agreement, but only every other yes is coming through.

MR JOSH HOLMES: Very good. It was simply (audio distortion) accepting that the documents that the parties regard as relevant should be reflected in the ambulatory drafts and that will provide a good basis for the Tribunal then to consider the matters that are contentious and are in issue at the hearing. So I don't think there is any dispute between myself and Mr Brealey.

I hope now that I am clear, if not it may be that I should speak to the IT people here. Is the signal reasonably reliable?

THE PRESIDENT: You're now back so that we can hear every word, so thank you very much, Mr Holmes. I'm very grateful to you.

So, Mr Brealey, I think we are singing from the same hymn sheet, and from that point of view that has been a helpful exchange.

MR BREALEY: Incredibly helpful, sir, because that's not the way one would have read paragraph 37.4 of AD1, and that's not the way one would read what happened in the Defence. So I think it is important for us to get this groundwork, and obviously the exchange has been fruitful. But that is why I have made the points because it is important that it's not just a statement of fact in the decision that should be adopted. This ambulatory draft has to include all the documents that we say are relevant to this alleged agreement.

THE PRESIDENT: Yes, I quite accept that. I mean, let me be clear about what we meant about disagreements in relation to decisions: the problem I have encountered with regulatory appeals of this sort is that the CMA can't be expected and can't adduce evidence to support each and every factual assertion that appears in a decision. It just can't happen in that way. What you have to do is you have to work out those factual statements that are hot and those which are actually agreed.

Now, to the extent that you have identified a disagreement in relation to a point, and this is obviously one where we know there is a disagreement, there is not a problem. What I find is a problem is that one gets innocent little statements in decisions which seem on the face of it to be right, but when you start unpacking them, they assume a significance which is sometimes disproportionate to their length. And what I don't want is I don't want that sort of unpacking to occur at the appeal or the hearing of the appeal; it needs to occur beforehand.

Now, I'm not going to go to examples from past cases where everyone has been taken by surprise at where something goes, that wouldn't be productive. But it does happen and

the reason it happens is because there hasn't been enough unpacking before the hearing and what you get is you get a situation where one person is saying: well, this sentence clearly means X and another person saying: this sentence clearly means Y, and you don't have the means of resolving it at the hearing because everyone has thought it meant something which it may well mean.

So it's these hidden disputes that are so important to identify. I'm not really worried about the areas where with the cards on the table, the parties are saying this is all wrong. It will be more likely some point about how the market operates, some regulatory question which is stated correctly in either the pleadings or the decision or somewhere, but which assumes a significance later on. And I don't want that happening on week three of the hearing; I want it happening in the course of July and that's my point.

MR BREALEY: I fully understand it. So if I can give the Tribunal another example: if one goes back to bundle 4, there is an expert regulatory report of Dr Rina Newton. Now, the thrust of her evidence is that it is unlawful to market a child's version of hydrocortisone for use in adults.

That is quite an important fact when it comes to what the CMA should have happened. So this is a prime example of whether there could be common ground and --

MR JOSH HOLMES: Sir, I hesitate to interrupt Mr Brealey, but really this is not the occasion to be traversing matters that are disputed. These matters are covered in the CMA's Defence and we're really here considering case management. So I'd wonder about --

MR BREALEY: That's the whole point **(Overspeaking)**.

I'm sorry, Mr Holmes, I was speaking and I was trying to articulate how this ambulatory process was going to develop and actually the intervention does show that there is going to be a dispute about that. That will have to be dealt with at trial and that will take time.

THE PRESIDENT: Yes, well thank you very much.

Mr Brealey, you -- just double-checking -- yes, you are in both appeals. What's your position on option 1 and option 2?

MR BREALEY: Could I just clarify one thing on option 1, which was: was the Tribunal advocating only the ambulatory process for the hydrocortisone in November, or was it advocating the process for both but just that the liothyronine hearing was going to be heard several weeks before, separately?

THE PRESIDENT: That's a very good question and the answer is that if we bifurcated now, then the liothyronine case would go to a different Tribunal. The reason it would go to a different Tribunal is partly because bifurcation would entail an acceptance that there is no need for the same Tribunal to hear both, which I think is the position of everybody; and secondly, it seems to me in principle wrong to overburden for no good reason a single group of members with two heavy appeals; and thirdly, if one were to say for no good reason the same Tribunal should hear both, then the flexibility in terms of when it can be listed is hugely diminished simply by virtue of the diaries of the three members here.

So the only reason for applying the same membership is if one applies novel approach in the same hearing to both. If one doesn't do that, then it seems to me that for the reasons I have given, liothyronine goes elsewhere, and it seems to me that we would make, on that basis, vanilla case management directions for liothyronine and then hand the case over in good order to whoever would take over the matter whenever it was listed, and I floated as option 1 a hearing in June/July. I heard what Mr O'Donoghue has said about September/October. That, I suspect, is also doable. The reason we didn't suggest that as option 1 was because I was concerned that there would be an overburdening of counsel, given the proximity of two heavy appeals and given what has been said about the weight of material that's going in there.

But it does seem to me that option 1A, if I can call it that, which is splitting and hearing liothyronine after the summer, is a variant on a theme on which I've heard Mr O'Donoghue, and I would want to hear other parties as well, which is why I've raised it now.

MR BREALEY: Then can I answer. So we are clearly in favour of option 1 in the sense that it is separated from hydrocortisone. As we said in our skeleton, we are sympathetic to being heard in September and October to accommodate Mr O'Donoghue, who is obviously the lead counsel for Cinven. So it's either option 1A or option 1 is our very strong preference.

THE PRESIDENT: Just to press you a little bit on that, you don't see any particular time advantage in dealing with the matter more quickly in June/July than in, let us say, September/October.

MR BREALEY: Actually, I mean, obviously everybody wants these to be determined as quickly as possible. We certainly don't want it to go into 2023, no one wants that. So the sooner the better, so clearly June/July is a good date for us, but we are sympathetic to Cinven who has clearly put a lot of work into their Notice of Appeal and so if it was September, that would be fine.

The difference between July and September, it just means you don't go away necessarily for the whole of August. But we are sympathetic to Cinven and if it was September, that would be largely better than October.

THE PRESIDENT: Well, I understand. I mean, I can't say anything about more precision than that. September is not a traditional time but then the Tribunal is not a traditional tribunal in terms of court terms. All I can say is the reason we haven't been looking at dates earlier than November has been a combination of my commitments and counsel's commitments and of course shifting liothyronine out of my diary removes certain commitments and makes September/October possible when previously it was not. So

hydrocortisone, which on any view will be retained by this constituted tribunal has to start at some time in November.

MR BREALEY: You cut off a little bit, but I understand from that that the present panel will deal with hydrocortisone in November, but there may be a two week extension in December, depending on how we got on. Clearly we would like Lio to be dealt with as quickly as possible. If it's June/July, and those are the only dates we can give, then we would have to go for that. But we are sympathetic to Mr O'Donoghue, so if it was September/early October/late September. It's doable but clearly it's tough, but it's doable.

THE PRESIDENT: Well, thank you very much, Mr Brealey.

Now, I am conscious that in order to clarify your concerns, I may have cut you off. If I have, then now is your chance.

MR BREALEY: No, no. There is an issue about how witness statements will deal with the draft but as long as the CMA know that it's very important for us for this alleged market sharing agreement to be viewed in a chronological, proper way, then we don't really mind whether it's called a draft whatever or a common list of issues. There was maybe not much difference between the two at the end of the day, but we need to put that marker down because we can't have a situation where we get a summary of the facts as in the Defence or indeed in the decision.

THE PRESIDENT: Well, thank you very much, Mr Brealey. I'm very grateful.

MR JOWELL: Mr Chairman, members of the Tribunal, starting with the two options, if I may, we, like I think the clear majority of appellants, strongly favour option 1, which we believe will lead to the least uncertainty and the most expeditious resolution of certainly our appeal in the hydrocortisone proceedings and indeed both appeals. So that's our clear preference, as well.

We are very grateful, of course, for the care and engagement that the Tribunal has shown to the case management of these appeals and we wholeheartedly and with respect agree with the desirability of defining the fact and issues in advance of the trial and of exposing, or unearthing as you have said, Mr Chairman, the real issues and to enable the Tribunal to fully prepare and be able to engage meaningfully and in detail from the outset of the hearing. So we are fully sympathetic to all of that.

We have had some concerns about the details of the draft and those have been partially allayed, but not entirely allayed by the explanations and clarifications provided by the Tribunal and, if I may, I will just elaborate on that briefly.

First of all, we are grateful for the change in nomenclature which we think is important. It shouldn't, in our submission, be called a draft judgment and that is clearly appropriate in light of the very helpful clarification that you have given: that the Tribunal is not intending in this document to rule even provisionally on disputed matters in advance of trial, and we gratefully adopt Mr Palmer's suggestion it should be called an expanded statement of facts and issues, or a draft or ambulatory expanded statement of facts and issues.

We also do continue to share the concerns that Mr Palmer has articulated about the role of the Tribunal in these drafts and the possible absence of formal consultation between the parties in advance of them being provided. If I may, I would just like to put slightly differently what I think is essentially the same point that he was making.

If one stands back, there will, of course, be certain facts or alleged facts that are clearly in dispute and are clearly centrally relevant to the resolution of the appeals. There is no doubt that those disputed, central facts are going to be pretty easy to identify and the Tribunal will be astute not to rule on them in any shape or form in this draft document, and they will be identified as issues.

But then there are what one might also call collateral facts which, Mr Chairman, you've referred to as background facts. Those are facts that are relevant or potentially relevant to the resolution of what are the main issues and those collateral facts can unfortunately be controversial. They can be controversial not only as to their precise content but it can also be controversial, as the exchange we have just seen between Mr Brealey and Mr Holmes has demonstrated, as to their selection. It can be controversial as to which facts are selected as relevant and, indeed, it can also be controversial as to the order in which they are presented and the emphasis and detail with which they are expanded upon.

The slight concern that we have is that those collateral facts will be included in the ostensibly uncontroversial section of this draft and the proposal, as we understand it, is that those will be provided by one party without a formal consultation with any of the other parties, without inter-parties consultation, and then they will be provisionally approved by the Tribunal. And it's really that step of provisional approval that does, it seems to us, give rise to at least a possibility or the potential of the Tribunal straying into controversial matters prior to the hearing, even if it's simply the selection, the formulation, the order of those potentially relevant collateral facts.

And so we think it would -- now, we agree that it's desirable that the Tribunal needs to get to grips with these collateral facts and they need to be expounded, and we absolutely agree that the Tribunal shouldn't just sit back, as it were, passively, but it should engage with the drafts in an iterative manner. But what we would propose, like Mr Palmer, is that the parties really take the lead in producing drafts of these documents, seeking to identify the formulation of agreed facts and agreed issues or points on which they disagree, and to then present those to the Tribunal iteratively for the Tribunal to engage with those drafts actively; not just accept them, but seek elucidation, an explanation of them potentially, as it were, effectively you could knock heads together. So it could

say: come on, that's not very helpful, what does that really mean, could you identify -- surely there are further issues underlying that issue or that fact that you have identified, and could then encourage the parties to reframe the issues or the facts, or identify further issues.

But at the end of the day, we say that the document would still be the parties' document and we say that that will produce a process that is just as useful, we think, but will be ultimately more robust and will not have the dangers of unfairness and of the Tribunal straying into ruling on controversial matters.

Now, we do appreciate that there are dangers of any process that requires the parties to agree things and, Mr Chairman, you rightly identified two which experience teaches one is absolutely correct. The first danger you identified was the possibility that it could give rise to an anodyne document that is effectively an unhelpful fudge, and the other is that it can lead to an overly lengthy and extensive process that's just an immensely expensive process.

We agree that both of those are dangers of a process of agreeing facts and issues and experience teaches one that that's correct. But we think there is an answer to that which will at least seriously mitigate that. That is for the Tribunal to make clear that it is not seeking agreement at all costs, that it has a preference for clear delineation of disagreement rather than for a fudge, and that the parties, if they can't agree, shouldn't go on endlessly trying to thrash out agreement, but they should just agree to disagree and do so at a relatively early stage so as not to string things out in endless iterations. But we think that provided that that is clarified, that is a preferable procedure.

It may or may not be necessary for the Tribunal to rule on effectively quite the degree of party involvement and quite the degree of the Tribunal involvement, but we would certainly encourage it to do so at this juncture and to adopt that solution, Mr Palmer's solution really, which I hope I have articulated as well.

Unless I can be of further assistance, those are our submissions.

THE PRESIDENT: No, Mr Jowell, I'm very grateful. Thank you very much.

I think, that brings me, Mr Kennelly, to you and we now transit to someone who is solely interested in the liothyronine appeal. So over to you, Mr Kennelly, and then we will finish with Mr Holmes.

MR KENNELLY: Thank you, sir.

Our straightforward point on behalf of Hg, not least having heard all the submissions and exchanges between counsel and the Tribunal, is that the process envisaged by the Tribunal is much more likely to succeed if liothyronine is not in it. That's because there will be fewer contributors to the drafting process and fewer issues that need to be addressed. And so for that reason, in common with all of the appellants, we prefer option 1.

There is no doubt that the process the Tribunal is envisaging is complex, it's front-loading a great deal of work, but also it's novel, and I think it's a point Mr Palmer also made: the more novel the process, the greater the risk that difficulties will arise, and in our view, in our submission, the risk of difficulty arising reduces and the chance of success improves if liothyronine is taken out.

In removing liothyronine, the benefits of the Tribunal's envisaged process will not be materially different, because there are no efficiencies in including liothyronine. The Tribunal has seen the consensus view across all the parties, including the CMA, that there is no material overlap between the two cases. And it was very useful, sir, to hear your intervention on why the Tribunal envisaged having liothyronine and hydrocortisone heard together in part to assist the legal teams involved. The Tribunal has now heard from all of those legal teams and you have the clear submission from everyone, including the CMA, as to the lack of an overlap.

There was a further point, sir, about problems that arise at the go/no go, the hearing in July, and there is a further problem that has not yet been raised. It's to do with the availability of legal teams because it's possible that the legal teams currently instructed may not be able to block out both those slots in November and periods in 2023, and the Tribunal could find itself at the July hearing realising that it's not possible to proceed with both cases at the same time, then seek to list one of them in late 2023. You have seen the table showing the lack of availability in the first half of 2023 but by then of course, the legal teams' counsel may not be available. There could be a real problem then in counsel availability and at that point, it may be necessary to instruct new lawyers to take over the cases for a hearing in late 2023 with inevitable inefficiency, waste and the potential for delay.

So it's much better, in our submission, to lock it down now, to separate liothyronine and let it go down a different track. I ought to say also that because there is no overlap in the issues, any material overlap, there is no problem having a different panel as you, sir, envisage if liothyronine is separated now.

As regards timing, it won't surprise you to know that Hg is happy with the hearing in June. As the Tribunal said, it is possible to do it by then, but like Mr Brealey, we have also heard the submissions from Mr O'Donoghue for Cinven and we could also do the liothyronine hearing/trial in September. It's in the Tribunal's reason --

THE PRESIDENT: And October, just to be clear. The reason I say that is not because I have any views against September, but because I cannot speak to the diary issues of the hypothetical new Tribunal. That is obviously something I would take up with the registrar in due course, but am I right then that I can proceed on the basis that you have no difficulty with June/July, September/October?

MR KENNELLY: And November, indeed.

THE PRESIDENT: And November, indeed. For obvious reasons, November is a non-starter given the need, and for equally the same reason, September is quite an attractive date. Am I right -- I should have asked this of others -- but three weeks is, viewing matters conventionally, what you would say is the timeframe need for the liothyronine appeal?

MR KENNELLY: Yes, sir. And we understood the Tribunal's concern, the reason (audio distortion) suggested what it did was again to facilitate counsel. But you have heard the submission from Mr O'Donoghue and Mr Brealey, they're happy to have it in September and Hydro in November. So for that reason, we would be content with the trial in September, or indeed October, if that's what had to be arranged.

Sir, I have a point to make -- very short point on the ambulatory draft. If you are against me and we have to (inaudible) the ambulatory draft process, I have a single point to make, which is to echo the point made by Mr Palmer: that publicising or giving publicity to the earlier iterations of the ambulatory draft in our submission would greatly complicate the process and lead to greater intransigence potentially on the part of the parties. It would move more smoothly if it were not publicised, but I am hoping that that will not involve Hg.

Those are my submissions.

THE PRESIDENT: Mr Kennelly, I'm very grateful. Thank you very much.

Mr Holmes, you have maybe not quite the last word, I will probably have a bidding contest for anyone who wants to have something more to say. But Mr Holmes, over to you.

MR JOSH HOLMES: Thank you, sir. I should say immediately that I have seen that I have bad network quality so if you have any difficulty hearing me, please do let me know and perhaps I will dial in in order to make my submissions so as to be sure that they come across loud and clear.

THE PRESIDENT: We will certainly do that.

MR JOSH HOLMES: Thank you. So the first point is that we strongly support the Tribunal's proposals for active case management and the ambulatory draft process as it's described.

We had understood from the document which was circulated before today's hearing that the Tribunal always had in mind that this would set out and explain the background, it would identify the parties' positions on the points of controversy, and it would clearly demarcate the battle lines but not resolve them as set out at paragraph 38. That was always our understanding and we think that that is the correct approach, with respect, so we would support it.

We are more sanguine about Tribunal involvement in the process of preparing that document than some of the other counsel. We are mindful that in Commercial Court proceedings, it's often the case at the first CMC that there will be disputes about list of issues or about the case summary, which will be addressed and the court will hear argument about them. It will look at the parties' cases as they're pleaded and it will resolve them in order to determine what, based on the relevant pleadings, are the issues in the case.

We don't see a problem with the Tribunal playing a similar role, and we think it will be useful to have the Tribunal in the background for this process, because it will make sure that the parties do approach this in a suitably collaborative way and that they won't use this as an exercise for forensic advantage.

We agree that this process is (audio distortion) and really will need to avoid anyone trying to present the facts in a partial way. We will all need to approach this cooperatively and without seeking to be partial in our presentation of the material. So that's just as a first observation on the ambulatory process.

Turning to the practical question raised and the options that were presented by the Tribunal, sir, we favour option 2 and I will explain the reasons why.

First, we consider that the Lio appeals, if I can call them that, like the Hydro appeals, will benefit from the disciplines of a process to refine and focus the matters in issue along the lines that are proposed by the Tribunal. Although this has been presented as extremely novel, and there is some novelty to it, it is an incremental development and it goes with the grain of the Tribunal's guide to proceedings which emphasises the need for active case management, and we think that that will be equally useful in the context of liothyronine.

Now, of course that process will take some time to play out and it tends to suggest that a June hearing would not be practical, however the two cases are heard. We wouldn't, for our part, favour proceeding on the basis of a conventional approach in liothyronine.

The second point, sir, is about the hearing length. With the safety valve of two additional weeks, we anticipate that five weeks should be sufficient to hear both sets of appeals. We endorse the Tribunal's desire to proceed on the basis of shorter hearings. That matches, again, with the approach set out in the Tribunal's guide to proceedings, it should come as no surprise. We have in particular in mind paragraphs 7.103 and 7.104 of the guide which state that since the parties will already have set out their case in full in the pleadings and skeleton arguments, oral submissions before the Tribunal can normally be kept short, within time limits set by the Tribunal, and structured so as to focus on the main points of the written argument. Main hearings will generally be conducted in accordance with a timetable. Rule 19.2A and rule 53.2A, the Tribunal will usually invite the parties to agree a timetable and a running order for submissions in advance of the hearing. All hearings are fixed lengths. They may not run on beyond the final fixed date.

We say that, bearing that in mind and with careful timetabling, we think a maximum of five weeks will be sufficient, and we suspect it can be done quicker than that.

Some of the appellants' protestations that longer will be needed are somewhat ethereal. They are not really focused by reference to any specifics about how timings at the hearing might be broken down. We appreciate it's hard to do it at this distance in time but with the ambulatory draft process, it should be possible to focus matters so as to dispense with opening submissions entirely or at least to keep them extremely short.

The factual and expert evidence can be circumscribed, in particular the expert evidence can be dealt with efficiently by means of hot tubbing. That is a great way for the Tribunal to engage directly with the experts and to avoid hearing repetitious cross-examination. With those devices in play, we think that the timetable proposed by the Tribunal, three weeks with two in reserve, that safety valve would allow option 2 to be robust.

The third point is we do think that there are some efficiencies in the same Tribunal hearing both appeals. Although the overlaps are relatively modest, they do nonetheless exist, and this is the same sector of economic activity and there are clearly some commonalities where the Tribunal would benefit from experience gained across the two appeals.

Fourthly, we would endorse the Tribunal's suggestion of a decision point in July to decide upon the shape of the trials and if necessary a decision could be made then to move to a different track, but we hope and think that that is unlikely to eventuate.

Fifthly and as a practical matter, we do have difficulties of availability for the CMA's current counsel team to attend a trial of the Lio appeals in July and our fallback would therefore be if you preferred - if the Tribunal preferred option 1, to have the hearing in September or October rather than in the course of June and for our part, we would have good availability for that.

Subject to any questions the Tribunal may have, those are the CMA's submissions.

THE PRESIDENT: Mr Holmes, I'm very grateful.

I can take as read the other parties' opposition to the CMA's endorsement of option 2, but if there are points that require fresh articulation or new points, then I will hear from anyone. But you can obviously take on board that we have heard what all of you have said and unless there is anything that anyone on the appellants' side wants to say, we will rise to consider where we go from here.

MR O'DONOGHUE: Sir, can I just make one point.

The current theme of today, sir, has been an element of ships in the night and wrong ends of various sticks. One of the difficulties of course is that these questions have been approached in a largely abstract manner to date and I do wonder, sir, as a suggestion where the discipline of reducing this to something which looks like a draft order then for presentation to the parties with very, very quick turnaround might be a way of cutting through a lot of the clutter and concretising things which, to some extent today, have been dealt with on a largely abstract basis.

I was struck, sir, by the number of times in which there was simply a misunderstanding as to what the Tribunal actually meant compared to the way multiple people in the same way read the ambulatory draft, and that is one practical suggestion of wrapping all this up quickly and nailing down any final disputes.

THE PRESIDENT: Well, thank you very much, Mr O'Donoghue, that was very helpful.

Anyone else before we rise?

MR KENNELLY: May I make two very short points.

THE PRESIDENT: Of course, Mr Kennelly, please do and then Mr Jowell.

MR KENNELLY: First of all, Mr Holmes' anxiety to have procedural efficiency in Lio can be addressed separately in Lio. There is no need for us to be joined to Hydro for that. The tools and techniques that might make Lio more efficient can be done in the Lio-only trial and hot tubbing, and so forth, can be done there. There is no need to join Hydro for that purpose.

Secondly, the CMA's position of this has been very clear. Their skeleton explains with admirable clarity how little overlap there is between liothyronine and hydrocortisone, and may I refer the Tribunal back to that.

THE PRESIDENT: Mr Kennelly, I don't think you need do so. Mr Holmes I think put it very fairly. This is a situation where at most, the background facts and the legal team overlap make this a runner. But you can take it that it is very marginally so and Mr Holmes' submissions were I think precisely calibrated to that and you don't need to stress that this is not a case where absent the overlap in counsel team and our desire to explore new ways of resolving matters would in any way push this into the field of hearing together. So it's - the overlap, counsel's position and our ambition and the question is: is it an overweening ambition to deal with matters by way of a novel process. Those are what make it a hearing together.

So I don't need to hear you on the separateness, not because I disagree, but because I entirely understand where everyone is coming from on this point. That has been one of the points of unanimity amongst the parties and all I see between you and Mr Holmes is a difference in stress, which is entirely understandable and helpful.

MR KENNELLY: I'm grateful.

THE PRESIDENT: Mr Jowell.

MR JOWELL: Yes. I just wanted to remind the Tribunal that my understanding is that on the last occasion, the CMA's estimate for the hydrocortisone appeal was six weeks. It's now moving to three to five weeks for both appeals on the basis entirely, as we understand it, of what it concedes is a novel process. And that is, in our respectful submission, rather heroically overoptimistic.

MR JOSH HOLMES: We said three weeks or less on the last occasion and I think a number of parties' estimates have shifted --

THE PRESIDENT: They have. Mr Holmes, you don't need to -- Mr Jowell is right, it's a question of (a) how optimistic do we feel, but (b) more importantly, even an optimist has to recognise that the glass may be half empty rather than half full and one needs to game the risks because we are probably in the more optimistic camp than most of the persons before us. But the last thing we want is for this process to fall flat on its backside some time around July, so that is something we have well in mind, Mr Jowell. Unless there is anything more, thank you very much. We will rise until 3.50 when we will come back with what we are going to say.

Just before we rise, though, and really following on from Mr O'Donoghue's helpful intervention about ships passing in the night and the need for clarity, if really more by way of experiment of the process we were to say we want some easy low hanging sections drafted and we want it done fast, see just how it works, how quickly do you think a number of parties could do a particular piece of low hanging fruit?

MR O'DONOGHUE: Sir, it rather depends on the topic.

THE PRESIDENT: It does.

MR O'DONOGHUE: If it's essentially a black-letter issue of what is the legislative framework for orphan designation, or what is the law on object or what are the core principles of unfair pricing, that can be done very rapidly indeed, I suspect. But once one gets beyond something which is to some extent banal or easily tractable, it may well depend.

THE PRESIDENT: If we were to stick to the banal for the moment, when you say very rapidly indeed, what do you mean?

MR O'DONOGHUE: It may depend how many you are feeling simultaneously. But on a discrete topic like the legislative framework for orphan designation and market authorisation, I think two or three weeks seems to me achievable. But I do stress it very

much depends on the subject matter. I wouldn't put that in a template or an opening bid --

THE PRESIDENT: Mr O'Donoghue, don't worry, we're not going to say we would like the entire background facts done in two or three weeks, tempting though that is.

Does anyone, accepting the reservations or the health warnings that Mr O'Donoghue made about complexity and time, dissent from the two or three weeks notion for a banal section? Ms Ford, I see you have your hand raised.

MS FORD: Sir, the only point I wanted to draw the Tribunal's attention back to is there is currently a deadline for replies in mid-February and the parties will need to be focusing on that in the first instance. So while it may be that two to three weeks is a reasonable estimate post replies once the pleadings are finalised, it might well be something of a difficulty if we have to do them both at once.

THE PRESIDENT: Fair enough, and do I take it that all of the parties take the view, and I confess I am on the sceptical side of this, that if one were to go down this new process, this novel route, that replies are as helpful as they are elsewhere?

MR O'DONOGHUE: Sir, clearly on the evidence we will need replies.

THE PRESIDENT: Absolutely, absolutely. Okay, that's very helpful.

Well, thank you all very much. I see it's now 3.45. We will resume at 3.55. Thank you very much.

(3.42 pm)

(A short break)

(4.03 pm)

(For Ruling - see [2022] CAT 2)

Post ruling discussion

THE PRESIDENT: If there is anything important that I have missed, I hope the parties will draw the matter to my attention. Otherwise I would like to record my very great gratitude to all of the parties for their most helpful submissions on what has not been a straightforward case management conference.

MR BREALEY: Thank you, sir.

MR O'DONOGHUE: Sir, just to clarify, did we understand that -- sir, you will recall that on the replies for liothyronine there is a dispute of dates. Did I understand from your ruling that you would prefer to deal with that in one go once you've circulated the draft order?

THE PRESIDENT: What we will do is we will resolve, on paper, by way of our draft, the dispute. But we will not finally resolve it, so if any party thinks the order doesn't work we will hear from them. If necessary we can schedule a very brief remote hearing or we can deal with it on the papers. I do want to get these orders put to bed by close of play Friday next week to include, to be clear, the sections of low hanging fruit that we will be drafting, so we will need something from the parties by, let us say, close of play Wednesday on that front. But we will, in the course of that week, seek to resolve any difficulties about dates and we will obviously hear from the parties if there are problems.

Mr Jowell, I see you have your hand up.

MR JOWELL: Yes, I apprehended from the time and from your comments that you might be about to conclude the case management conference and I wonder if there just might be a possibility of the Tribunal dealing with our application to amend which is --

THE PRESIDENT: Uncontroversial.

MR JOWELL: -- at least as between the parties.

THE PRESIDENT: Yes, we should have said that at the outset. We see no problem in granting that application. It seems to me as close to a no brainer as today has got.

MR JOWELL: I'm very grateful, thank you very much.

MR O'DONOGHUE: Sir, on a valedictory note, I am pleased to inform the Tribunal that the Opus database I think is up and running. We will give the Tribunal an ongoing update on its status.

THE PRESIDENT: Mr O'Donoghue, that's very helpful, thank you very much. We do regard -- although we haven't mentioned the database -- we do regard the database as quite central to ensuring that everyone is literally on the same page, albeit electronic rather than physical, so thank you very much; I'm very grateful to you for that information.

MR JOSH HOLMES: If I could add one further point of information, sir: I understand that the confidentiality order in liothyronine has now been agreed, so the parties will provide that in final agreed form for the Tribunal's approval.

THE PRESIDENT: Thank you very much. That, again, is very helpful, Mr Holmes. We will make that order when we get it, so thank you very much.

It's very hard to see if anyone has something to say but I'm taking silence ...very good.

Thank you all very much. We are really very grateful. I will end the hearing now. Thank you.

(4.44 pm)

(The hearing concluded)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?